(2)

86-6867

No. 86-____

RECEIVED
HAND DELIVERED
MAY 12 1987
10:12 a.m.
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Of Counsel:

Maurice N. Ross
395 South End Avenue
Apartment 8-D
New York, New York 10280

Jonathan Horn
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Nancy Marshall
755 Magazine Street
New Orleans, Louisiana 70130

Gary S. Guzy*
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 783-1200

Counsel for Petitioner

*Attorney of Record

QUESTIONS PRESENTED

1. Whether, in this capital case, petitioner was denied his constitutional right to a fair and impartial jury trial by the trial court's insistence that the jury resolve its deadlocked status in the penalty phase, by forcing the jury to deliberate for an unreasonably lengthy period of time, by polling the jury, and by use of coercive supplemental instructions encouraging a verdict?

2. Whether the sentencing scheme by which petitioner faces death, based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions?

3. Whether, in this capital case, petitioner was denied his constitutional right to the assistance of counsel by the trial court's denial of petitioner's and trial counsels' pretrial motions for substitution of counsel due to a fundamental and irreconcilable disagreement as to the defense to be presented?

4. Whether, in this capital case, petitioner was denied the constitutional right to the effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty, as is presently before the Court in Burger v. Kemp, No. 86-5375 (cert. granted, 55 U.S.L.W. 3315 (1986), argued 55 U.S.L.W. 3694 (March 30, 1987))?

5. Whether petitioner was denied the constitutional due process right to a fair trial, by a state rule imposing on him the burden of proving incompetence to stand trial?

LIST OF PARTIES

Petitioner is Leslie Lowenfield, an indigent prisoner incarcerated in Louisiana State Penitentiary at Angola, Louisiana, under a sentence of death. Respondent is Hilton Butler, the warden of that prison.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	
LIST OF PARTIES	
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
I. Petitioner was denied his right to a fair and impartial jury trial by the trial court's insistence that the jury resolve its deadlocked status in the penalty phase, by forcing the jury to deliberate for an unreasonably lengthy period of time, by polling the jury, and by the use of coercive supplemental instructions encouraging a verdict	5
II. The Fifth Circuit's decision upholding petitioner's death sentence, based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions and conflicts with the rule in another Circuit and the highest courts of several states	9
III. Petitioner was denied his Sixth Amendment right to the assistance of counsel by the trial court's denial of petitioner's and trial counsels' pre-trial motions for substitution of counsel due to a fundamental and irreconcilable disagreement as to the defense to be presented	13
IV. Petitioner was denied the constitutional right to effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence	

Pages

that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty. Further, this issue is identical in all material respects to the claim raised in Burger v. Kemp, No. 86-5375, and petitioner's execution should, at a minimum, be stayed pending a decision in that case..... 15

V.

Petioner was denied the constitutional due process right to a fair trial by a state rule imposing on him the burden of proving incompetence to stand trial..... 18

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases	Pages
Allen v. United States, 164 U.S. 492 (1896).....	7
Barefoot v. Estelle, 463 U.S. 880 (1983).....	4
Bradley v. Alabama, 494 So.2d 772 (Ala. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1385 (1987).....	10
Brasfield v. United States, 272 U.S. 448.....	8
Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970).....	15
Burger v. Kemp, No. 86-5375 (cert. granted, 55 U.S.L.W. 3315 (1986), argued 55 U.S.L.W. 3694 (March 30, 1987)).....	15, 17
California v. Ramos, 463 U.S. 992 (1983).....	9, 11
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985).....	9
Cornell v. Iowa, 628 F.2d 1044 (8th Cir.), cert. denied, 449 U.S. 1126 (1981).....	8
Cuyler v. Sullivan, 446 U.S. 335 (1980).....	14
Drope v. Missouri, 420 U.S. 162 (1975).....	18
Ellis v. Read, 596 F.2d 1195 (4th Cir.), cert. denied, 444 U.S. 973 (1979).....	8
Furman v. Georgia, 408 U.S. 238 (1972).....	10
Glidewell v. State, 663 P. 2d 738 (Okla. Cr. 1983).....	10
Government of Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir. 1984).....	14
Gregg v. Georgia, 427 U.S. 153 (1976).....	11
Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied, 411 U.S. 986 (1973).....	7
Jones v. Thigpen, 788 F.2d 1101 (5th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1292 (1987).....	17
Leland v. Oregon, 343 U.S. 790 (1952), 421 U.S. at 705.....	19
Locks v. Sumner, 703 F.2d 403 (9th Cir.), cert. denied, 464 U.S. 933 (1983).....	8

Pages

Lowenfield v. Phelps, slip op. at 12 (E.D. La. March 31, 1987)..... 6

Morris v. Slappy, 461 U.S. 1 (1983)..... 14

Mullaney v. Wilbur, 421 U.S. 684 (1975)..... 19

Pate v. Robinson, 383 U.S. 375 (1966)..... 18

Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, _____ U.S. _____, 106 S.Ct. 198 (1985)..... 9

Patterson v. New York, 432 U.S. 197 (1977)..... 19

Powell v. Alabama, 287 U.S. 45 (1932)..... 13

Rivera v. Delaware, 429 U.S. 877 (1976)..... 19

Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983)..... 9

State of Louisiana v. Lowenfield, 495 So. 2d 1245.... 4,5,11,16,18

State v. Bennett, 345 So.2d 1129 (La. 1977)..... 19

State v. Williams, 490 N.E.2d 906 (Ohio 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1385 (1987)..... 10

Strickland v. Washington, 466 U.S. 668..... 14, 15, 16

United States Ex Rel. Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982)..... 19

United States ex. rel. Kirk v. Director, Department of Corrections, 678 F.2d 723 (7th Cir. 1982)..... 8

United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984)..... 14

United States v. Cronic, 466 U.S. 648 (1984)..... 14

United States v. DiGilio, 538 F.2d 972 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977)..... 19

United States v. Makris, 535 F.2d 899 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977)..... 19

United States v. Rey, 811 F.2d 1453 (11th Cir. 1987)..... 7

Welcome v. Blackburn, 793 F.2d 672 (5th Cir.), cert. denied, 107 S.Ct. 9 (1986)..... 10

Pages

Wiley v. Mississippi, 484 So. 2d 339 (Miss.), cert. denied, _____ U.S. _____, 107 S. Ct. 304 (1986)..... 10

Wilson v. Butler, No. 86-3537, slip op. (5th Cir. March 24, 1987)..... 17

Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985)..... 15

Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3346 (U.S. May 4, 1987) (No. 86-5026)..... 10

Woodson v. North Carolina, 428 U.S. 280 (1976)..... 11

Zant v. Stephens, 462 U.S. 862 (1983)..... 12

Statutes

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 2254..... 1

La. Code Crim. Proc. Ann. art. 905.3 (West 1986)..... 15

La. Code Crim. Proc. Ann. art. 905.4(b)..... 11

La. Code Crim. Proc. Ann. art. 905.5(e) (West 1986)..... 15

La. Code Crim. Proc. Ann. art. 905.3 (West 1986)..... 11

La. Code Crim. Proc. Ann. art. 905.4(d) (West 1986)..... 11

La. Rev. Stat. Ann. § 14:30A.(3) (West 1986)..... 3, 11

La. Rev. Stat. Ann. § 15:432 (West 1986)..... 18

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner Leslie Lowenfield respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on May 11, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, p. 33a, infra.

The memorandum decision of the United States District Court for the Eastern District of Louisiana (Beer, D.J.) has not been reported. It is reprinted in the appendix hereto, p. 1a, infra.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, the petitioner brought this habeas corpus petition in the Eastern District of Louisiana. On March 31, 1987, the Eastern District

denied petitioner's request for relief and his application for a certificate of probable cause.

Petitioner then sought a certificate of probable cause to appeal and a stay of his execution from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit denied his application on May 11, 1987.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner relies on the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ., and to have the Assistance of Counsel for his defense.

Petitioner also relies on Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further relies on certain provisions of the Louisiana Code:

> A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may nonetheless be destroyed by

> rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings . . . that the defendant is sane and responsible for his actions. . . .

La. Rev. Stat. Ann. § 15:432 (West 1986).

> when the offender has a specific intent to kill or inflict great bodily harm upon more than one person.

La. Rev. Stat. Ann. § 14:30A.(3) (West 1986).

The Louisiana capital sentencing statute, upon which petitioner also relies, is reproduced in the appendix hereto, beginning at p. 34a.

STATEMENT OF THE CASE

Petitioner is a state prisoner under sentence of death who seeks review of the decisions denying him a writ of habeas corpus and a stay of execution. In May, 1984, petitioner was sentenced to death following convictions on three counts of first degree murder and two counts of manslaughter. Petitioner was found to have murdered his former girlfriend, members of her family, and another boyfriend of his girlfriend. Petitioner was convicted entirely on the basis of circumstantial evidence. The Louisiana Supreme Court affirmed the conviction and sentence. State v. Lowenfield, 495 So.2d 1245 (La. 1985).

After a death warrant was signed, petitioner sought state habeas corpus relief via new counsel. Relief was denied five days before his scheduled execution and petitioner filed a habeas petition with the Eastern District of Louisiana on November 17, 1986, two days before his scheduled execution. Following an evidentiary hearing, the trial court denied the petition on March 31, 1987. The Eastern District of Louisiana denied petitioner's motions for a stay of execution pending appeal and for a certificate of probable cause for appeal on April 30, 1987.

Having learned of the existence of a warrant for petitioner's execution for May 7, 1987, counsel immediately filed an appeal to the Fifth Circuit Court of Appeals on May 4, 1987, and that court scheduled argument for May 6, 1987. In the meantime, the state court trial judge granted a temporary stay until midnight on May 12, 1987, because counsel had not been properly informed and timely notified that a death warrant was signed. The Fifth Circuit treated the application for a stay of execution as an appeal on the merits, pursuant to Barefoot v. Estelle, 463 U.S. 880 (1983). In a lengthy opinion with one dissent, a

panel of the Fifth Circuit denied petitioner's application late in the afternoon of May 11, 1987.

Additional pertinent facts will be presented as they relate to petitioner's various claims.

REASONS FOR GRANTING THE WRIT

I.

Petitioner was denied his right to a fair and impartial jury trial by the trial court's insistence that the jury resolve its deadlocked status in the penalty phase, by forcing the jury to deliberate for an unreasonably lengthy period of time, by polling the jury, and by the use of coercive supplemental instructions encouraging a verdict.

After deliberating for thirteen hours over the course of two days to reach a verdict of guilty, the jury, soon thereafter and over trial counsels' objections, sat through two hours of penalty phase arguments and was sent out again by the judge to arrive at the appropriate sentence. State of Louisiana v. Lovenfield, 495 So. 2d at 1258-59. By this time it was past 8:00 p.m. The jury deliberated for four hours that night and, near midnight, requested and was allowed to retire. Id. After more than two additional hours of deliberation the next morning, counsel for petitioner requested a mistrial because of the length of time the jury had been out. Id. This motion was denied and the jury continued to deliberate. Over three hours later -- a total of more than nine hours of deliberation on the sentencing phase alone and twenty-one hours altogether -- the foreman of the jury sent the judge a note stating that, "The jury is having great distress and is unable to reach a decision at this point. There is great imbalance in the voting. Please call us back in and direct the jury again as to its responsibilities . . . . Id. (emphasis added). Counsel for petitioners once again moved for a mistrial, which was denied. Id.

The trial court then polled the jury and found that four of the twelve jurors disagreed with the statement that "further deliberations would be helpful in obtaining a verdict." Id. After the jury expressed concern that they may have misunderstood the judge's inquiries, the judge again polled the jury, this time asking whether they felt that "any further deliberation will enable [them] to arrive at a verdict?" Id. One juror persisted in his or her view that additional deliberation would be unavailing. Id. Yet, the judge continued in his efforts to secure a unanimous verdict, and indicated that he would send the jury out for further deliberations. First, he charged them by stating:

> [I]t is your duty to consult with one another, to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment . . . . Do not hesitate to reexamine your own views and to change your opinion . . . .

Trial Transcript at 2351. The trial court further admonished the jury that their failure to reach a unanimous verdict would lead the court to impose the sentence of life imprisonment. Lowenfield v. Phelps, slip op. at 12 (E.D. La. March 31, 1987). Approximately thirty minutes later, the jury came back with a recommendation of death. Id., at 13.

The above-described record amounts to nothing short of an extraordinary trammeling of petitioner's Sixth Amendment rights to a fair and impartial jury trial. Through sheer persistence in keeping the jury deliberating for lengthy periods, the violation of the sanctity of jury deliberations, and coercive jury instructions, the trial court achieved a sentence of death. These practices merit this Court's careful review. Particularly troubling here are the fact that the trial judge essentially isolated a single hold-out juror through his polling technique and the fact that the ccerciveness of his actions were confirmed

by the rapid time period in which a sentence was thereafter rendered.

Many years ago this Court reviewed and approved a similar supplemental jury charge in Allen v. United States, 164 U.S. 492 (1896). Since that time, courts have recognized that other factors in addition to a jury charge may render jury deliberations fundamentally unfair and that courts must review the totality of the circumstances to assess the presence of coercion. The Sixth Circuit, for example, has not hesitated to find a violation of the Sixth and Fourteenth Amendments, on the totality of the circumstances on facts nearly identical to those in petitioner's case. Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), cert. denied, 411 U.S. 986 (1973).

Moreover, courts and the legal profession have significantly retreated from use of what has come to be known as the "Allen charge," even when considered apart from other circumstances. United States v. Rey, 811 F.2d 1453, 1458 (11th Cir. 1987). At least eighteen states have rejected its use, three federal circuit courts have prohibited Allen charges, and four other federal circuits have limited their use due to its unsalutary coercive effects on juries. Id. Nonetheless, this retreat from the Allen charge is not complete. In Rey, for example, while a panel of the Eleventh Circuit expressed its concern over the constitutional infirmities of such charges, it felt bound by a prior en banc decision of its predecessor court to uphold the practice there. Rey, supra, 811 F.2d at 1459. This result cannot be reconciled with the Sixth Circuit's decision in Norvell, supra, 472 F.2d 1185. The courts below failed to recognize these important developments in the analysis of jury coercion. It is crucial for this Court, both in its supervisory capacity and to resolve a split among the federal circuit courts, to address the significant development of this important issue.

This court expressed great concern over juror polling of the type used here in Brasfield v. United States, 272 U.S. 448. In Brasfield, the Court set up a per se rule against such practices. Justice Stone wrote:

> We deem it essential to the fair and impartial conduct of the trial that the inquiry [into the numerical division of the jury] itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division . . . . It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury . . . .

272 U.S. at 450.

While Brasfield has been uniformly interpreted by the federal circuits facing the question as being rooted in the Court's supervisory power rather than in the Constitution,[1] these courts also have recognized the importance of considering such intrusive practices as part of the totality of the circumstances of juror coercion properly subject to review.[2] The courts below totally failed to assess this factor, alone or in combination with the other overwhelming indicia of coercion in this case.

Moreover, the trial court's practices which are here being challenged -- concerning timing of the jury deliberations, violation of jury sanctity, and coercive supplemental instructions -- take on particular poignance because they arise in the context of a capital penalty phase proceeding. As discussed in Part I, supra, this Court has repeatedly insisted that the cap-

---

1 Locks v. Sumner, 703 F.2d 403 (9th Cir.), cert. denied, 464 U.S. 933 (1983); United States ex. rel. Kirk v. Director, Department of Corrections, 678 F.2d 723 (7th Cir. 1982); Cornell v. Iowa, 628 F.2d 1044 (8th Cir.), cert. denied, 449 U.S. 1126 (1981); Ellis v. Read, 596 F.2d 1195 (4th Cir.), cert. denied, 444 U.S. 973 (1979).

2 Locks, 703 F.2d at 406; Kirk, 678 F.2d at 727; Cornell, 628 F.2d at 1048.

ital sentencing determination be reliable enough to withstand a heightened level of scrutiny.[3] At least one court has recognized the special character of bifurcated sentencing proceedings and held that use of an Allen charge in that context is wholly impermissible. Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, ____ U.S. ____, 106 S.Ct. 198 (1985); Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 461 U.S. 909 (1983). This important constitutional issue merits the Court's attention.

II.

The Fifth Circuit's decision upholding petitioner's death sentence, based on a sole statutory aggravating circumstance that merely repeats an element of the crime, violates the Eighth Amendment requirement that sentencer discretion be directed and limited so as to minimize the risk of arbitrary and capricious executions and conflicts with the rule in another Circuit and the highest courts of several states.

All parties to this capital case concede that petitioner's death sentence rests upon a single statutory aggravating circumstance that merely repeats an element of the underlying offense. Petitioner's case presents a square conflict in the circuits and, indeed, highlights a sharp divergence of views among a number of state high courts as well.

In Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), the Eighth Circuit found unconstitutional the Arkansas capital sentencing scheme which provided an aggravating circumstance that merely repeated an element of the underlying crime. That court held, as petitioner argues here, that the Arkansas provision was constitutionally infirm because it failed "to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same

[3] See, e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983).

underlying capital crime," thereby running afoul of the Court's concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972). Collins, 754 F.2d at 264. State high courts have joined in this concern over "double-counting" of aggravating circumstances.[4]

In petitioner's case and others, the Fifth Circuit has declined to adopt the Eighth Circuit's view on the constitutional infirmities created by such a system. (Appendix at ____). See, e.g., Welcome v. Blackburn, 793 F.2d 672 (5th Cir.), cert. denied, 107 S.Ct. 9 (1986); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3346 (U.S. May 4, 1987) (No. 86-5026).[5] Indeed, in petitioner's case, the Fifth Circuit remained unmoved by a failure to guide sentencer discretion far more severe than that confronted by the Collins court. In Collins, the Eighth Circuit overturned a death sentence based on three statutory aggravating circumstances when one such circumstance overlapped with the definition of the crime. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance -- with nothing else supporting his sentence of death.

The bedrock principle upon which this Court's modern capital punishment doctrine is based is that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

---

[4] See, e.g., Glidewell v. State, 663 P. 2d 738, 743 (Okla. Cr. 1983).

[5] Several states have joined in this view. See, e.g., State v. Williams, 490 N.E.2d 906 (Ohio 1986), cert. denied, ____ U.S. ____, 107 S. Ct. 1385 (1987); Bradley v. Alabama, 494 So.2d 772 (Ala. 1986), cert. denied, ____ U.S. ____, 107 S. Ct. 1385 (1987); Wiley v. Mississippi, 484 So. 2d 339 (Miss.), cert. denied, ____ U.S. ____, 107 S. Ct. 304 (1986).

Gregg v. Georgia, 427 U.S. 153, 189 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.). Strict adherence to this doctrine of guided sentencer discretion is crucial due to the qualitative difference of death from all other punishments and the corresponding need for greater scrutiny of and certainty in a capital sentencing determination. See e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.).

The Louisiana capital sentencing scheme under which petitioner is sentenced to die runs squarely afoul of these constitutional requirements. Petitioner's sentence is based on a sole statutorily defined aggravating circumstance[6] -- "the offender knowingly created a risk of death or to inflict great bodily harm to more than one person."[7] This factor is duplicative of the definition of first degree murder of which petitioner was found guilty.[8] While Louisiana has a bifurcated procedure to determine guilt or innocence and then the appropriate sentence in capital cases, the sentencing jury is not required to find that aggravating factors outweigh mitigating ones to impose death, but need only find beyond a reasonable doubt that one statutory aggravating circumstance exists to recommend a sentence of death.[9] Here, due to the complete identity of the definition of the crime and the statutory aggravating factor, the jury need only have found petitioner guilty -- with-

---

[6] While the jury also found the additional statutory aggravating factor that "the victim was a witness in a prosecution against the defendant," La. Code Crim. Proc. Ann. art. 905.4(b), the Louisiana Supreme Court on direct review found that the evidence was insufficient, as a matter of state law, to support this finding. State v. Lowenfield, 495 So. 2d 1245, 1256 (La. 1985).

[7] La. Code Crim. Proc. Ann. art. 905.4(d) (West 1986).

[8] La. Rev. Stat. Ann. § 14:30A.(3) (West 1986).

[9] La. Code Crim. Proc. Ann. art. 905.3 (West 1986).

out anything more -- to sentence him to death. This unbridled juror discretion permitted by the Louisiana statute is no different in operation than many of the pre-Furman statutes invalidated by the Court fifteen years ago.

This Court has explicitly recognized the crucial constitutional role served by statutorily delineated aggravating factors in appropriately limiting and guiding juror discretion. As the Court stated in Zant v. Stephens, 462 U.S. 862 (1983), to avoid the unconstitutional risk of arbitrary death sentencing:

> . . . an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

462 U.S. at 876. The Louisiana statutory aggravating circumstance here fails both these tests. By providing no sentencer guidance other than that already contained in the definition of first degree murder, the death-eligible class remains unconstitutionally broad and is not circumscribed by legislative definition and the jury is free to impose the death sentence on anyone found guilty of the underlying crime.

If petitioner were sentenced under an identical scheme in the Eighth Circuit, he would, at a minimum, receive a new sentencing proceeding. The chaotic state of the law created by the courts' divergence of views means that a prisoner convicted under such "double counting" -- which presents a surprisingly common incidence based on the number of reported cases raising this issue -- may face execution or be spared dependent solely upon the fortuity of the state in which his or her crime was committed. Such a situation in itself smacks of the arbitrariness the Court found so disquieting in Furman and cries out for resolution.

III.

Petitioner was denied his Sixth Amendment right to the assistance of counsel by the trial court's denial of petitioner's and trial counsels' pre-trial motions for substitution of counsel due to a fundamental and irreconcilable disagreement as to the defense to be presented.

The record reveals that petitioner and his counsel agreed on one significant point only: that petitioner should have new appointed counsel due to fundamental and irreconcilable disagreements as to the defense strategy to be presented. The relationship between client and counsel deteriorated to an impasse, with conviction and a sentence of death not a surprising conclusion in light of this history of distrust and recriminations.

Trial counsel believed the only plausible defense was insanity, whereas petitioner insisted that his counsel develop and present an alibi defense and refused to entertain any arguments in favor of insanity. On May 8, 1984, petitioner ordered his attorneys to withdraw his plea of not guilty by reason of insanity and also so informed the court. (Habeas Petition, ¶ 159.) Around the same time, petitioner's appointed trial counsel and petitioner separately moved to withdraw from their representation and to have new counsel appointed. Id. Counsel further informed the court that they had received written death threats, believed to be from petitioner, as well as accusations from petitioner that they had deceived petitioner in various respects. (Exhibit D to Habeas Petition.)

Under these extraordinary circumstances, it is beyond peradventure that trial counsel should have been replaced. The Sixth Amendment's guarantee to a criminal defendant of the assistance of counsel has long been recognized as a core feature of our jurisprudence. See, e.g., Powell v. Alabama, 287 U.S. 45, 68-69 (1932). As the Court has recognized, where the surrounding

circumstances made it so unlikely that any lawyer could provide effective assistance and the circumstances suggest a breakdown in the adversarial process, ineffectiveness is properly presumed without inquiry into counsel's actual performance at trial. United States v. Cronic, 466 U.S. 648, 661-62 (1984). Using similar standards, the Court has recognized that an actual conflict of interest constitutes the type of situation where prejudice and a Sixth Amendment violation are to be presumed. Cuyler v. Sullivan, 446 U.S. 335, 350-51 (1980).[10]

The circumstances in petitioner's case are much like those where a conflict of interest exist and the same rules should apply; counsel believed they were so constrained in their relationship with their client that they utterly failed to explore and present any mitigating evidence of mental impairment despite the obvious existence of such a factor and their personal knowledge of its existence and they further failed to discuss such a tactic with petitioner.[11] (Federal Habeas Transcript of February 16, 1987, at 4-6.) See, e.g., Government of Virgin Islands v. Zepp, 748 F.2d 125, 136, 139 (3rd Cir. 1984) (finding Sixth Amendment violation without showing of prejudice for actual conflict of interest resulting from a divergence with respect to "legal issue or to a course of action."); United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984) (same).

---

[10] See Strickland v. Washington, 466 U.S. 668, 692 (1984) (justifying presumption in conflict cases by noting the difficulty of measuring the precise effect on the defense if representation corrupted by a breach of the duty of loyalty).

[11] The courts below erred in analogizing petitioner's claim to that in Morris v. Slappy, 461 U.S. 1 (1983). In Morris, the Court considered whether a "meaningful" relationship between attorney and client created a cognizable Sixth Amendment claim where the client's preferred appointed counsel was ill but the substitute counsel was fully prepared to go to trial on theories concurred in by the client. 461 U.S. at 6, 13. Here, petitioner and his counsel could only agree that they had irreconcilable and fundamental strategy differences and that counsel should withdraw.

The federal circuit courts have recognized that a court's refusal to replace appointed counsel after an irreconcilable difference of opinion with a client amounts to a Sixth Amendment denial. Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970). The Sixth Circuit has explicitly held that constitutional choice of counsel claims are not subject to the prejudice requirement enunciated by this Court in Strickland v. Washington, 466 U.S. 668 (1984). Wilson v. Mintzes, 761 F.2d 275, 285 (6th Cir. 1985). This Court should explicitly affirm the important constitutional principle that choice of counsel issues are properly carved out from the prejudice requirement of Strickland due to the irrelevance of that standard to the appropriate inquiry as well as the identity of the analysis here and in a conflict of interest case.

IV.

Petitioner was denied the constitutional right to effective assistance of counsel due to trial counsel's failure to investigate and present available mitigating evidence that if presented to the sentencing jury would have resulted in a reasonable probability of a sentence of life imprisonment as opposed to the death penalty. Further, this issue is identical in all material respects to the claim raised in Burger v. Kemp, No. 86-5375, and petitioner's execution should, at a minimum, be stayed pending a decision in that case.

Louisiana law provides that a mental disease or defect impairing the capacity of the offender, at the time of the offense, to "appreciate the criminality of his conduct or to conform his conduct to the requirements of law" is a mitigating circumstance. La. Code Crim. Proc. Ann. art. 905.5(e) (West 1986). The Louisiana death sentencing statute requires the jury to consider evidence of mitigating circumstances before imposing the death penalty. La. Code Crim. Proc. Ann. art. 905.3 (West 1986). Despite these unambiguous provisions, trial counsel for

petitioner presented virtually no evidence of mitigation at the sentencing phase and failed utterly to present any evidence of mental impairment.[12] In light of the substantial available evidence on the record of mental impairment and the likelihood that this evidence would have resulted in a reasonable probability of a sentence other than death, petitioner was denied his right to the constitutionally effective assistance of counsel as explicated in Strickland v. Washington, 466 U.S. 668 (1984).

Trial counsel were aware that one of the psychiatrists at petitioner's last sanity hearing testified that petitioner was insane and that the defendant was too paranoid to assist his attorneys. State v. Lowenfield, 495 So. 2d at 1251. The three other psychiatrists agreed that petitioner was "paranoid in the extreme" and "primitive," but found him competent to stand trial. Id. Counsel never secured an opinion or testimony from these or any other psychiatrists whether petitioner suffered from the less extreme problem of mental impairment at the time of the offense.

Counsel also failed to pursue the potentially significant fact, told to him by petitioner, that he sustained a serious head injury while residing in Canada. Indeed, medical records describing this injury were readily available and could have formed the basis for a neurological opinion on mental impairment. (Habeas Transcript at 106).

---

[12] It is probable that counsels' failure is attributable to the intolerable relationship with their client resulting from the fundamental disagreements, lack of trust, and accusations described in Section III, supra. That this dispute had a major adverse impact on counsels' judgment is further evidenced by their failure to object to admission of the murder weapons, which were purportedly discovered by family members at the crime scene well after an extensive police investigation, and were introduced with an inadequate chain of custody. This information came to light at nearly the same time as counsel were dealing with their client more as an adversary. This explanation does not render these shortcomings any more constitutionally acceptable, however.

Trial counsel also were personally aware of petitioner's impaired mental state. They had received paranoid, bizarre and threatening letters from petitioner concerning the representation strategy and investigation. They also were aware that petitioner had written similarly strange letters to members of his and the victims' families. In light of these known facts, as well as counsels' failure to present any other significant mitigating evidence, it was professionally unreasonable for counsel not to have developed and presented mitigating evidence of mental impairment. See, e.g., Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986), cert. denied, _____ U.S. _____, 107 S. Ct. 1292 (1987).

There is a reasonable probability that this mitigating evidence would have resulted in a sentence less than death. The jury only found a single supportable statutory aggravating circumstance on which its recommendation of death was based. The Fifth Circuit has recently recognized the potential force of mitigating evidence of mental impairment, remanding in light of the fact that a jury found only a single statutory aggravating circumstance supporting its recommendation of death. Wilson v. Butler, No. 86-3537, slip op. (5th Cir. March 24, 1987).

The courts below erred in not finding trial counsels' failure to investigate and forfeiture of mitigating evidence constitutionally ineffective and in failing to ascribe prejudice to this inadequate representation. This Court should review these practices as part of its supervisory powers and provide much needed guidance to the federal district and circuit courts.

The issues raised by petitioner's claim are in all material respects identical to those the Court now faces in Burger v. Kemp, No. 86-5375 (cert. granted, 55 U.S.L.W. 3315 (1986), argued 55 U.S.L.W. 3694 (March 30, 1987)). Both cases involve a total failure of counsel to investigate and present

known mitigating factors. This Court should, in the alternative, stay petitioner's execution until resolution of the issues in Burger v. Kemp.

V.

Petioner was denied the constitutional due process right to a fair trial by a state rule imposing on him the burden of proving incompetence to stand trial.

Louisiana law presumes a defendant's sanity. La. Rev. Stat. Ann. § 15:432 (West 1986). Petitioner therefore had the burden of establishing his incapacity. State v. Lowenfield, 495 So.2d at 1252. Petitioner contends that this allocation of the burden is violative of due process fairness requirements because it required him to bear the burden of assisting his counsel in the very manner hs is attempting to show that he cannot. See Illinois v. McCullum, 362 N.E.2d 307 (Ill. 1977). Once competence has been raised as a bona fide issue, the constitution requires the State to bear the burden of showing that a defendant is competent to stand trial.

In Pate v. Robinson, 383 U.S. 375 (1966), this Court established that the constitutional due process right to a fair trial mandates state procedures adequate to ensure that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. Accord, Drope v. Missouri, 420 U.S. 162 (1975). This Court has never squarely addressed the question of whether the allocation of the burden of proof to prove incompetence falls within those constitutionally guaranteed

procedures.[13] Contrary to the courts below, at least one federal circuit has found that the due process clause is violated where a state procedure places the burden of proving incompetency on a defendant. United States Ex Rel. Bilyew v. Franzen, 686 F.2d 1238 (7th Cir. 1982). Cf., United States v. DiGilio, 538 F.2d 972, 933 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (due process prohibits allocation of burden of proof to defendant in federal prosecution); United States v. Makris, 535 F.2d 899 (5th Cir. 1976), cert. denied, 430 U.S. 954 (1977) (same).

The courts below erred in failing to recognize the constitutional infirmity in the Louisiana statute.[14] The Court should address this important and open constitutional question to resolve the differing interpretations by the federal circuit courts.

---

[13] Two members of the Court have expressed the view that the Court's decision in Mullaney v. Wilbur, 421 U.S. 684 (1975), requiring the prosecution to prove beyond a reasonable doubt the absence of a heat of passion defense when the issue is properly raised, does not conflict with the Court's holding, that there is no constitutional requirement that a State shoulder the burden of proving the sanity of a defendant, in Leland v. Oregon, 343 U.S. 790 (1952). 421 U.S. at 705 (opinion of Rehnquist, J. & Burger, C.J. concurring). This view was confirmed by the Court's dismissal of Rivera v. Delaware, 429 U.S. 877 (1976), a case which squarely presented the issue of the constitutionality of burdening a defendant with proving his insanity defense. See Patterson v. New York, 432 U.S. 197, 205 (1977). Nonetheless, that decision does not foreclose the issue here because the issue of competence is distinct from that of insanity under Louisiana law. State v. Bennett, 345 So.2d 1129 (La. 1977).

[14] The District Court also wrongly concluded that petitioner waived this issue by withdrawing his plea of not guilty by reason of insanity. Louisiana law is clear, however, that insanity and incompetence are quite separate legal concepts. State v. Bennett, 345 So.2d 1129 (La. 1977).

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Gary S. Guzy*
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 783-1200

Counsel for Petitioner

Of Counsel:

Maurice N. Ross
395 South End Avenue
Apartment 8-D
New York, New York 10280

Jonathan Horn
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Nancy Marshall
755 Magazine Street
New Orleans, Louisiana 70130

*Attorney of Record

No. 86-____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that true and correct copies of Petitioner's Motion for Leave to Proceed In Forma Pauperis and Petition for Writ of Certiorari were served today by overnight courier, postage prepaid, to each of the following:

Honorable William J. Guste, Jr.
Attorney General of the
State of Louisiana
State Capitol Building
22nd Floor
450 Riverside Mall
Baton Rouge, LA 70804

John Mamoulides
District Attorney of
Jefferson County
Jefferson Parish Courthouse
Annex Building, Fifth Floor
Gretna, LA 70053

May 12, 1987

Respectfully submitted,

Gary S. Guzy
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
1575 Eye Street, N.W.
Washington, DC 20005
(202) 783-1200

Attorney of Record for
Petitioner

(3)

86-6867

RECEIVED
HAND DELIVERED
MAY 1 2 1987
10:13 a.m.
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 86-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LESLIE LOWENFIELD,

Petitioner,

v.

HILTON BUTLER, Warden,
Louisiana State Penitentiary
at Angola, Louisiana,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MAR 31 2

LESLIE LOWENFIELD,
Prisoner No. DOC-106178

VERSUS

C. PAUL PHELPS, SECRETARY OF
THE DEPARTMENT OF CORRECTIONS,
STATE OF LOUISIANA, et al

CIVIL ACTION

NO. 86-5036

SECTION: M (1)

MEMORANDUM DECISION

This matter is before the Court on motion of Petitioner, Leslie Lowenfield, for a writ of habeas corpus and stay of execution, pursuant to 28 USC §2254. Petitioner claims that he is being detained unlawfully by respondent, Frank Blackburn, in his official capacity as warden of the Louisiana State Penetentiary at Angola, Louisiana. This detention is pursuant to judgment of conviction and sentence of death imposed by the 24th Judicial District Court of Jefferson Parish, Louisiana. Petitioner claims that this conviction and sentence were in violation of rights, privileges, and immunities guaranteed by the Constitution of the United States. For the following reasons, Petitioner's request for relief must be DENIED.

FACTS

The facts are set forth extensively by the Louisiana Supreme Court in State v. Lowenfield, 495 So.2d 1245 (La. 1985). They are recounted here as they relate to the issues raised.

Petitioner met Sheila Thomas, the "primary" victim, in July of 1981. At the time, she was working in the sheriff's department in Jefferson Parish, where her principal duty was to escort prisoners from the parish jail to the courthouse and return them back to that facility. In August of 1981 Sheila and her young daughter, victim Shantell Osborne, moved in with Petitioner. The relationship deteriorated

into one of acrimony, punctuated by periodic separations. This living arrangement was terminated in June of 1982.

Subsequent to this break up, relations between Petitioner and Sheila Thomas and her family became increasingly bitter. About 5:30 p.m. on 30 August 1982, Sheila Thomas' stepfather, Owen Griffin, was sitting in a vacant lot near his home in Marrero, Louisiana, playing cards with his neighbors, when he heard shots ring out from the Griffin residence. He rushed to the house and ran inside, whereupon more shots rang out.

When the police arrived, they found five bodies sprawled about the living area of the house. Along with Sheila Thomas and her four year old daughter, Shantell, were the bodies of Carl Osborne, the father of Shantell, Owen Griffin, and his wife, Myrtle Griffin. All had sustained multiple gunshot wounds. Each had been shot in the head at close range.

A jury convicted Petitioner of three counts of first degree murder and two counts of manslaughter. Following the presentation of evidence during the sentencing phase of the trial, the jury unanimously recommended the death sentence. On 29 May 1984 Petitioner was sentenced to death on each count of first degree murder. The Louisiana Supreme Court affirmed the jury's findings and the sentence on 2 December 1985. The trial court signed Petitioner's death warrant on 3 September 1986, setting his execution for 19 November 1986. In the trial court proceedings, Petitioner filed a petition for post-conviction relief, habeas corpus, evidentiary hearing and stay of execution on 12 November 1986. The trial court denied Petitioner's petition on 14 November 1986. Petitioner filed the instant motion with this court on 17 November 1986, two days before the date of execution. He asserted sixteen claims for relief. This court stayed Petitioner's execution on 18 November 1986.

Following a conference with counsel for Petitioner and the State, this court granted Petitioner's request for an evidentiary hearing, setting it for

12 February 1987. At the evidentiary hearing, which included testimony from Petitioner at Angola, Petitioner was permitted to introduce evidence and testimony to support the contentions hereafter discussed.

CLAIM 1 Instruction of the Jury

In his first claim for relief, Petitioner asserts that the aggravating circumstance that formed the basis for the death sentence, as applied in this case, violates the eighth and fourteenth amendments because the jury was improperly instructed.

Petitioner was sentenced to death by the jury on the basis of its finding two statutory aggravating circumstances: La. Code Crim. Proc. Ann. arts. 905.4(d) and 905.4(h). The Louisiana Supreme Court found that the evidence adduced at trial was insufficient to support the aggravating circumstance set forth in article 905.4(h). Thus, the aggravating circumstance upon which Petitioner's sentence stands is set forth in article 905.4(d): that Petitioner "knowingly created a risk of death or great bodily harm to more than one person."

At the sentencing phase of Petitioner's trial, the court instructed the jury that in order to find the existence of the aggravating circumstance set forth in La. Code Crim. Proc. Ann. art. 905.4 (d), it was required to find that Petitioner knowingly created a risk of death or great bodily harm to more than one person. Petitioner claims that the court was obligated to instruct the jury that it had to find that Petitioner "acted with specific intent to kill more than one person and actually caused the death of one person and the risk of death or great bodily harm to at least one person, all by a single act or by a series of acts in a single consecutive course of conduct." Petitioner's brief, at 20 (emphasis in original). For support of this assertion Petitioner cites State v. Williams, 480 So.2d 721, 726 (La. 1985). Because the jury was not instructed in accordance with the holding in Williams, Petitioner argues, the aggravating circumstance upon which he was sentenced could not provide the discretion-guiding function required by the United States Supreme Court. See, e.g., Furman v. Georgia, 408

U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976).

In Williams, decided subsequent to Petitioner's conviction and sentencing, the issue was whether the evidence was sufficient to prove both that (1) defendant acted with a "specific intent to kill...more than one person" (one of the aggravating elements in La. Rev. Stat. Ann. §14:30's definition of first degree murder that must be proved in the guilt phase), and (2) that defendant "knowingly created a risk of death...to more than one person" (the aggravating circumstance of article 905.4(d) that must be proved in the penalty phase). The Williams court held that the two statutes should be construed similarly, even though one defines the crime and the other involves the standards for jury discretion in sentencing. Regarding article 905.4 (d), the Williams court observed that

> the Legislature intended to classify among the most serious murders those in which the murderer specifically intended to kill more than one person and actually caused the death of one person and the risk of death or great bodily harm to at least one other person, all by a single act or by a series of acts in a single consecutive course of conduct.

Williams, at 726.

The Williams court, however, did not deal with jury instructions. Its objective was to determine whether the evidence supported the jury's affirmative finding of an aggravating circumstance in both the guilt and penalty phases. In a factual setting less compelling than the instant one, the Williams court found that the evidence supported the jury's findings. The Louisiana Supreme Court had the same opportunity in the instant case and likewise determined that the evidence adduced at trial supports the jury's findings. This court finds no constitutional defect in that court's conducting of its appellate review.

CLAIM 2 Duplication of the Elements of the Underlying Crime in the Aggravating Circumstances

In his second claim for relief Petitioner asserts that the aggravating circumstance upon which the death sentence is based merely duplicates the elements

of capital, or first degree, murder under Louisiana law. As such, Petitioner argues, the statutory aggravating circumstance in this case does not provide a rational basis for the imposition of the death penalty.

Petitioner was convicted of three counts of first degree murder and two counts of manslaughter. Under La. Rev. Stat. Ann. §14:30 A.(3), first degree murder is the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The elements required to prove the existence of the sole aggravating circumstance upon which Petitioner's death sentence is based, La. Code Crim. Proc. Ann. art. 905.4(d), are, indeed, duplicative of the elements needed to prove the underlying crime of first degree murder. Petitioner argues that this violates constitutional requirements as set forth by the United States Supreme Court.

In 1972 the United States Supreme Court struck down as violative of the eighth and fourteenth amendments death sentences imposed under statutes that left juries with "untrammeled discretion" to impose or withhold the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). Four years later, in Gregg v. Georgia, 428 U.S. 153, reh'g denied 429 U.S. 875 (1976), the Court ruled that Georgia's death penalty statute was constitutional. Furman and Gregg thus form the datum from which this Court's analysis must proceed.

After summarizing its former problems with affording juries untrammeled discretion, the Gregg court set forth a general exposition of sentencing procedures that would satisfy the concerns of Furman. Specifically, Georgia's statute set up a bifurcated process whereby after the jury first found that the defendant was guilty of murder, it would then pass upon the sentence to be imposed in a separate process. Georgia narrowed the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which must be found to exist after the guilt phase to impose a death sentence. Georgia defined murder as when a person "unlawfully and, with malice aforethought, ...causes the death

of another human being...." Ga. Code Ann. §26-1101 (1978). Thus, Georgia's statutory aggravating circumstances narrowed the class of persons eligible for the death penalty and reasonably justified the imposition of a more severe sentence on some people than on others convicted of the same underlying crime. The unifying theme of all Supreme Court death penalty review is that to be valid, a state's death penalty must provide a reasonable distinction between those convicted murderers who warrant death and those convicted murderers who do not. What is important at the selection stage, the Court has reiterated often, "is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862 (1983) (emphasis in the original); See also Godfrey v. Georgia, 446 U.S. 420 (1980).

Louisiana has a bifurcated process. Modeled after Georgia's statute, Louisiana's death scheme is different in that the definition of murder includes, or duplicates, the aggravating circumstances that are later used to distinguish between those convicted murderers who are to die and those who are to live. In 1979 the Louisiana Legislature amended La. Rev. Stat. Ann. §14:30 to add the requirement of an "aggravating circumstance" as an essential element of first degree, or capital, murder. Thus, the State Legislature incorporated the discretion-channeling function of aggravating circumstances into the definition of first degree murder, thereby requiring the finding of an aggravating element in the guilt phase of the trial, before the offender could even be subject to a penalty hearing. It is this aspect of Louisiana's death penalty statute that Petitioner attacks as violative of the mandate of Furman, Gregg, and cases that follow.

The Louisiana Supreme Court has held repeatedly that this statute is constitutionally valid. See, e.g., State v. Loyd, 489 So.2d 898 (La. 1986); State v. Knighten, 436 So.2d 1141 (La. 1983); State v. Clark, 387 So.2d 1124 (La. 1980). See also Wingo v. Blackburn, 783 F.2d 1046, 1051 (5th Cir. 1986); Gray v. Lucas, 677 F.2d 1086, 1104 (5th Cir. 1982). Petitioner, however, cites

to Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), cert. denied, ___ U.S. ___ , 106 S. Ct. 546 (1985) for support. In Collins, petitioner Carl Collins was convicted in Arkansas for felony murder, specifically charged in the bill of information as murder in the course of a robbery. In Arkansas at that time not all murder was capital murder, however. To obtain a capital murder conviction, the state needed to show the existence of at least one of six statutorily defined aggravating circumstances, one of which was felony murder. As in Louisiana, a finding of felony murder was not itself sufficient to warrant the death penalty. The jury had also to find at least one statutory aggravating circumstance, which, in Collins' case, was that the murder was committed for pecuniary gain.

The Eighth Circuit noted first that the aggravating circumstance used to sentence Collins was the same element that the state used to convict defendant of capital murder in the first place. "Thus, once Collins had been convicted for capital felony murder..., the jury had necessarily found one aggravating circumstance." Collins, at 263. Drawing from Godfrey v. Georgia, 446 U.S. 420 (1980), Zant v. Stephens, 462 U.S. 862 (1983), and Furman v. Georgia, 408 U.S. 238 (1972), the Collins court stated that "an aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime." Collins, at 264. The Eighth Circuit concluded that there is "no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function [required by Furman, Gregg, Godfrey, and Zant]." Id. Thus, argues Petitioner, in Louisiana, if no aggravating or mitigating circumstances are found in the sentencing phase, other than those already found in the guilt phase, the jury is left to decide whether to impose death on a murderer, who also acted with a specific intent to kill or inflict great bodily harm upon more than one person, without having made any finding that narrows the class of those who

have committed the same death-eligible crime. See also Wiley v. Mississippi, ___ U.S. ___ , 107 S. Ct. 304, 305 (1986) (Marshall, Brennan, JJ., dissenting) ("[T]he use of aggravating circumstances which repeat an element of the underlying capital offense creates a substantial risk that death will be inflicted in an arbitrary and capricious manner.").

The United States Supreme Court has interpreted the eighth and fourteenth amendments as requiring the states to provide statutory aggravating circumstances as discretion-guiding aids to juries. Zant v. Stephens, 462 U.S. 862, 878 (1983). The rationale underlying this is that such aggravating circumstances provide a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. 153, 188 (1976). The Supreme Court has not held, and this court does not interpret the U. S. Constitution to require, that the aggravating circumstance(s) used to sentence a defendant must be different from the element(s) of the underlying crime.

The Collins argument is flawed in practice. This argument requires the state to introduce something "extra" at the sentencing phase: an aggravating circumstance to narrow the class of death-eligible criminals. To allow the state to merely reintroduce at the sentencing phase that which was determined at the guilt phase, this argument suggests, is to make the sentencing phase but a sham. However, the reality of the situation is that the jury has, necessarily, already found the existence of the aggravating circumstance(s) by the time of the sentencing phase. Moreover, the Collins approach uses the sentencing phase to narrow the class of death-eligible offenders; Louisiana narrows the class at the definitional stage. The death-eligible class of murderers, having been narrowed from the larger pool of murderers, then goes before the jury for its decision in both systems. What is important at this stage is that the jury, with all the information available, has the same latitude of discretion that is constitutionally mandated. In actuality, the end result is identical in either system although slightly different--albeit

equally valid--routes are used in arriving there.

CLAIM 3 The Death Penalty as Discriminatorily Applied

Petitioner argues that Louisiana's death penalty, as applied, discriminates against black defendants in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U. S. Constitution. Petitioner, a black person, contends that Louisiana's capital punishment statute is discriminatorily applied on the basis of both the race of the defendant and the race of the victim. Therefore, claims Petitioner, his petition presents the identical issue on which the U. S. Supreme Court granted certiorari in McCleskey v. Kemp, cert. granted, _____ U.S. _____ , 106 S. Ct. 3331 (7 July 1986) and Hitchcock v. Wainwright, cert. granted, _____ U.S. _____ , 106 S.Ct. 2888 (9 June 1986).

This court granted Petitioner's request for an evidentiary hearing. The hearing was held on 12 February 1987 at which time Petitioner introduced testimony from Dr. Mervyn D. Smith, a Ph.D. in sociology. Dr. Smith had considerable expertise in the area of racial discrimination in the area of sentencing. However, having heard Petitioner's evidence on this claim, the court is obliged to conclude that the argument is without merit.

Petitioner further argues that because this case is similar to two cases presently before the Supreme Court, it should be stayed pending the Court's resolution of the issues. Petitioner did not, in any meaningful way, establish at the evidentiary hearing or otherwise that the instant case is controlled by the same issues that are present before the Supreme Court in McCleskey and Hitchcock. Petitioner did not produce evidence that even remotely established specific acts evidencing intentional or purposeful discrimination against him on the basis of race. Berry v. Phelps, 795 F.2d 504 (5th Cir. 1986); Prejean v. Maggio, 765 F.2d 482, 484 (5th Cir. 1984); Spinpellink v. Wainwright, 578 F.2d 582, 614 (5th Cir. 1978). Stated succinctly, Petitioner failed to statisfy his burden of proof that

he was discriminated against. Finally, this court is obliged to deal with cases and controversies according to existing jurisprudence; until that jurisprudence changes, this Court must be unaffected by the fact that it may, some day, change.

CLAIM 4 The Introduction At Trial of Arbitrary Factors

In this claim, Petitioner argues that arbitrary factors were introduced at the sentencing phase of his trial in violation of his right to due process under the fourteenth amendment. Petitioner cites four arbitrary factors.

First was the admission of a bill of information charging Petitioner with making harassing phone calls to the primary victim, Sheila Thomas, before her death. This bill was introduced to support the State's assertion of La. Code Crim. Proc. Ann. art. 905.4(h) ("the victim was a witness in a prosecution against the defendant") as an additional aggravating circumstance. The Louisiana Supreme Court held that the evidence was insufficient to prove that Petitioner killed Ms. Thomas to keep her from testifying against him, because Petitioner was only charged with this crime after the murders had occurred. Although the Louisiana Supreme Court ruled that the evidence was insufficient, it found that "given the overwhelming enormity of defendant's crime, it is inconceivable that the additional evidence that the defendant was charged with could have prejudiced defendant." State v. Louenfield, 495 So.2d 1245, 1258 (La. 1985). Petitioner takes issue with this. He argues that, far from being inconceivable, it was substantially likely that this flawed evidence could have tipped the balance in the minds of one or more jurors in favor of the death penalty, especially in light of the circumstantial posture of the case.

The federal judiciary's resistence to challenges in federal court of state court evidentiary matters by habeas corpus is firmly established. See, e.g., Bryson v. State of Alabama, 634 F.2d 862, 864 (5th Cir. 1981). A violation of state evidentiary rules will not, in and of itself, invoke section 2254 habeas

corpus relief. Id. The violation must be of such a magnitude that it constitutes a denial of fundamental fairness. Meyer v. Estelle, 621 F.2d 769, 771 (5th Cir. 1980); Cronin v. Alabama, 587 F.2d 246, 250 (5th Cir. 1979). The erroneous admission of prejudicial evidence can justify habeas corpus relief only if the error was "material in the sense of a crucial, critical, highly significant factor." Mills v. Henderson, 529 F.2d 397, 401 (5th Cir. 1976). In the instant case Petitioner was convicted of murdering five people, including a four year old girl. Each victim had been shot in the head at close range. The introduction of evidence pertaining to petitioner's making harassing telephone calls does not rise to the level of a denial of fundamental fairness.

Petitioner's second claim is that the jury was improperly charged, as set forth more fully in Claim 1. This cl .m has, therefore, been dealt with in detail, supra.

Petitioner's third claim is that the trial court allowed evidence of a prior criminal conviction in a foreign court without first requiring proof of the reliability and fairness of the foreign proceeding. Specifically, Petitioner was convicted of attempted rape and a weapons charge in Canada.

In Lewis v. United States, 445 U.S. 55 (1980), the Court recognized that under the sixth amendment an uncounseled felony conviction cannot be used for certain purposes. However, the Court noted this does not mean that such a conviction cannot be used for other purposes. Lewis dealt with the State's use of an uncounseled felony conviction for the purpose of imposing a "civil firearms liability, enforceable by a criminal sanction." 445 U.S. at 67. The Court distinguished Lewis from past cases in which the use of an uncounseled felony conviction was held invalid. In those cases, the Court stated, the subsequent conviction or sentence violated the sixth amendment because it depended upon the reliability of the past uncounseled conviction. However, the Court observed, federal gun laws focus not on reliability, but on the mere fact of conviction, or

even indictment, in order to keep firearms away from potentially dangerous persons. Thus, the Court held, "enforcement of that essentially civil disability though a criminal sanction does not 'support guilt or enhance punishment.'" Id.

In State v. Mattheson, 407 So.2d 1150, 1164 (La. 1982), the defendant objected to the introduction at the sentencing phase of prior convictions without a showing that he had been represented by counsel. Citing Lewis, the Mattheson court stated that the convictions "were not used to enhance punishment; rather, defendant's past criminal history was merely a part of the total picture of his 'character and propensities.'" Id. On appeal of the denial of Mattheson's habeas petition, the Fifth Circuit noted that it is clear that a habeas petitioner has the burden of proving that the convictions used by the state were constitutionally defective. Mattheson v. Maggio, 714 F.2d 362, 365 (5th Cir. 1983). See also Webster v. Estelle, 505 F.2d 926, 928-29 (5th Cir. 1974), cert. denied, 421 U.S. 918 (1975).

In the instant case, there is nothing in the record to show that Petitioner's prior criminal record was introduced for any reason other than to illustrate a part of the total picture of his character and propensities. Petitioner has the burden of showing at least some constitutional deficiency in the prior convictions introduced at the sentencing phase. This he has not done.

In his fourth claim, Petitioner assets that the trial judge coerced a seemingly deadlocked jury into sentencing Mr. Lowenfield to death.

The jury was charged in the afternoon of 15 May 1984. It deliberated over three hours that night. The next day the jury deliberated for another two hours when defense counsel moved for a mistrial. Several hours later defense counsel re-urged his motion. The jury was brought back into the courtoom when it indicated that it was deadlocked. The court again charged the jury, telling them that if they were unable to reach a verdict, the court would sentence petitioner to life imprisonment. In response to the court's poll, four jurors indicated that further

deliberations would not be helpful. The trial judge conferred with counsel, brought the jury back into court, and asked them: "Do you feel that any further deliberations will enable you to arrive at a verdict?" The result of the second polling was that one juror was of the view that further deliberations would not be helpful. The court sent them back to deliberate. Thirty minutes later the jury came back with its verdict. Petitioner claims that by ordering the jury to continue its deliberations despite a "clear indication that the jury was hopelessly hung, the court in effect coerced the jury to quash any dissent and to return a verdict of death." Pet. Br., at 43.

In Louisiana it is the trial judge who determines when a jury is deadlocked. State v. Monroe, 397 So.2d 1258, 1272 (La. 1981). His decision is not to be overturned except upon a showing of "palpable abuse of discretion." State v. Governor, 331 So.2d 443, 451 (La. 1976). Unlike the trial judge in Jones v. Norvell, 472 F.2d 1185 (6th Cir. 1973), which Petitioner cites for support, the judge in Petitioner's case did not invade the secrecy of the jury or identify a deadlocked jury's majority-minority count. Considered in light of the totality of the circumstances, the trial judge's decision to return the jury for further deliberations did not constitute a violation of Petitioner's constitutional rights.

CLAIM 5 Change of Venue

Petitioner argues that the trial court erred in not granting his motion for a change in venue. Petitioner claims that a change of venue should have been granted because of the "close working relationship" between the judges involved in the case and the primary victim, Sheila Thomas. Moreover, Petitioner claims that the trial court conducted a voir dire on Petitioner's motion for a change of venue that was inadequate to determine the actual prejudice resulting from the pretrial publicity. According to Petitioner, the court should have presumed actual prejudice from the pretrial publicity.

Petitioner first claims that the judges were unable to adequately distance themselves from Sheila Thomas and her family. Judge Collins testified at this court's evidentiary hearing that he had had contact with the Thomas family going back many years. He recused himself, and the case was re-alloted to Judge Carrella. Petitioner then claims that because Judges Collins and Carrella are part of the same judicial "team", and because Judge Carrella also knew Sheila Thomas, Judge Carrella could not impartially try Petitioner's case. At the evidentiary hearing Judge Carrella testified about the use and make up of the judicial teams; that they are, primarily, loose organizational structures designed to ensure that at least one judge will always be available at the courthouse. Judge Carrel . testified that he has no more contact with members of his judicial team than with other, remember, judges, and that he would be no more likely to confer with members than non-members concerning any given case or issue. More to the point, Judge Carrella testified that he did not know Sheila Thomas or her family, and became aware that she had, apparently, escorted prisoners to his courtroom only after the trial proceedings in this case had begun. Lastly, both Judges Carrella and Collins testified that they had, in fact, not discussed the Greenfield case at all. I find their testimony credible in all respects.

Petitioner claims that extensive pre-trial publicity permeated the local community to such an extent that he could not receive a fair trial. The trial court conducted two hearings on Petitioner's motions for a change in venue. The first hearing was held in April, 1983, eight months after the murders and over a year prior to trial. At this hearing Judge Collins heard twenty prospective jurors questioned about their knowledge of the publicity. Of the twenty, one was disqualified for a hearing impairment, three had heard reports of the case and had formed opinions, three had neither heard nor read of the case, one knew Petitioner, and the remainder of the people had heard of the deaths but had not formed an opinion. After hearing the testimony Judge Collins denied the motion.

The second hearing was held in May, 1984, just prior to the trial. Twenty-nine people were called and asked whether they had heard of the case. Ten responded affirmatively and the rest stated that they hadn't heard of the case. Of the ten, only two said they couldn't determine what effect the publicity would have on them, and only one had formed an opinion. Judge Cannella denied the motion.

Four of the jurors and alternate jurors actually selected to hear the case had heard about the series of events prior to trial. One of the accepted jurors stated that he questioned his ability to sit through the trial and be fair and unbiased. Another stated that he had a problem with the presumption of innocence, while another stated that she couldn't be sure that she could fairly serve on the jury if Petitioner failed to take the stand. Petitioner claims that the court's determination that an impartial jury could be chosen was highly questionable and, in fact, the jury actually chosen was not impartial and had been unduly prejudiced by pre-trial publicity.

Petitioner relies upon Irvin v. Dowd, 81 S. Ct. 1639 (1961) for the proposition that habeas relief is mandated where the trial court failed to give the defendant a full and fair opportunity to prove prejudice from pretrial publicity. The Court in Dowd pointed out that

> it is not required that jurors be totally ignorant of the facts and issues involved.... [A]n important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id., at 1642-43. The Court went on to say that the test is whether the nature and strength of that opinion suffice to rebut the presumption of a juror's impartiality as a matter of law. The question thus presented is one of mixed law

and fact. The Dowd Court held that "the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." Id.

Petitioner claims that the trial court at both hearings relied erroneously upon the statements made by the jurors themselves about their individual competence to impartially hear the case. He argues that the court should have made a more detailed and individualized questioning of the veniremen. Petitioner cites to United States v. Davis, 583 F.2d 190 (5th Cir. 1980) for support. In Davis, a case that attracted national coverage, every jury panel member had heard about the case. The trial judge asked whether any panel member felt that the publicity impaired his ability to render an impartial decision. No juror responded. The court denied defendant's request for individualized voir dire. The Fifth Circuit Court of Appeals held that "[t]he district court erred in not undertaking a more thorough examination of those panel members exposed to publicity." Id. The Davis court recognized that where pre-trial publicity is a factor, a juror's conclusory statement of impartiality is insufficient. Instead, the trial court, and not the juror, must determine, from questioning, whether the juror can lay aside any impression or opinion due to the exposure. However, this court has before it a habeas corpus review; a review of state proceedings. Davis dealt with appellate review of a federal district court criminal trial. The Fifth Circuit reversed the district court in Davis "in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, and not as a matter of constitutional compulsion." Murphy v. Florida, 421 U.S. 795, 797 (1975) (citing Marshall v. United States, 360 U.S. 310, 313 (1959)). Further, in this case the lawyers for both sides interviewed each prospective juror individually and often at great length. The voir dire transcripts occupy several hundred pages. Even if the judge were to

have asked questions of each potential juror, there would have been little he could have asked that the attorneys did not. Petitioner has failed to show that there was such pre-trial prejudice to warrant a change in venue.

Regarding the imperfections of the jurors actually chosen, this court read those applicable portions of the transcripts. Four of the jurors had heard about the case on the news. As discussed above, this, alone, means little, and Petitioner takes it no further. One of the jurors questioned his ability to sit through the whole trial and be fair-minded. However, this statement was made in the context of concern for his wife and new baby; he was worried about leaving them alone. His concern did not relate to this case as such, and once his concerns over his family were addressed, he agreed that he held no preconceptions. He was not challenged. However, one juror, Catherine Roberts, expressed an inability to not consider Petitioner's not taking the stand:

> MS. ROBERTS: ...I know right now the idea of his not being up there, I know if I'm thinking now I'm sure it might happen.
>
> MR. CAPITELLI: ...I need to know the answer now. I'm not going to get a chance to do it later. If it is causing you concern now, I need to ask you to articulate it in terms of would that effect in your mind concern you to the point you could not be totally fair?
>
> MS. ROBERTS: Yes.

Transcript, 9 May 1984, at 168. Ms. Roberts was asked a few more unrelated questions. She was not challenged. Petitioner apparently felt that she was a good juror for his cause. It may have been the way she looked, her religious affiliation (Lutheran (sic)), or something else. In any event, Petitioner was satisfied with her. Further, Petitioner *did* take the stand, so Ms. Roberts's reservations were mooted.

Petitioner contends that the trial court should have *presumed* prejudice to Petitioner based upon the pre-trial publicity. He claims that the pre-trial publicity in this case so pervaded and saturated the community that a fair trial

was impossible. In support of the contention that, in this instance, the court should have presumed prejudice, Petitioner cites: Rideau v. Louisiana, 373 U.S. 723 (1963); Mayola v. Alabama, 623 F.2d 992 (5th Cir. 1980); Shepard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965). Each of those cases is distinguishable. Prejudice was presumed in the circumstances under which the trials in Rideau, Estes, and Shepard were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In Rideau the defendant "confessed" under police interrogation to the murder for which he was later convicted. A twenty minute film of this confession was broadcast three times by a television station in the community where the crime and trial took place. In reversing, the Court did not examine the jury voir dire for evidence of actual prejudice because it considered the trial "but a hollow formality," the real trial having occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

In Mayola, the defendant, accused of the rape-murder of a young boy, turned himself in to authorities in a foreign state. A reporter from the town in which the trial was to take place finagled his way into the car that was used to transport the defendant. News reports of what the defendant was saying appeared as headline news each day. These stories were inculpatory and played upon the emotions of the population of a small town. Nevertheless, although these stories seemed prejudicial and, in some instances, erroneous, the court held that defendant did not meet his burden of showing the requisite pervasiveness of prejudice to warrant the court's presumption of prejudice. The trials in Estes and Shepard were overturned and prejudice presumed because the proceedings were not only infected by a background of inflammatory publicity but also by a courthouse given over to accomodate the public appetite for carnival. In the instant case Petitioner has shown neither the requisite degree or pervasiveness of prejudicial publicity

nor the requisite lack of decorum in the proceedings to warrant a presumption of prejudice.

CLAIM 6

Petitioner combines various issues in support of granting his writ of habeas corpus. To clarify the arguments raised within Claim 6, the Court will review the legal issues point by point, as addressed in the original petition.

A. The Constitutionality of La. Rev. Stat. Ann. §15:432

Petitioner first asserts that La. Rev. Stat. Ann. §15:432 violates the due process clause of the fourteenth amendment in that the statute impermissibly shifted the burden to the Petitioner to prove his competency to stand trial. Pet. Brief at 74. Petitioner avers that once the competency of a defendant is at issue, the burden should fall upon the prosecution to prove the defendant's fitness for trial. See, United States ex rel. v. Franzen, 686 F.2d 1238, 1244-45 (7th Cir. 1982); United States v. Makris, 535 F.2d 899, 906 (5th Cir. 1976); but see Mullaney v. Wilbur, 421 U.S. 684 (1975) (Rehnquist, J., concurring); Leland v. Oregon, 343 U.S. 790 (1952). In Franzen, the Seventh Circuit Court of Appeals ruled that there was "little question that the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised." 686 F.2d at 1244. This reasoning echoed sentiments expressed in a more limited context by the Fifth Circuit in Makris.

The reasoned pronouncements of the Fifth and Seventh Circuits with regard to the burden of proving a defendant's fitness to stand trial are unavailing to Petitioner, who voluntarily withdrew his insanity plea and opted for an alibi defense. Petitioner was accorded three sanity hearings. The conclusion reached by all three commissions was that Petitioner was sane. Following the third sanity hearing, Petitioner took the stand of his own volition and voluntarily withdrew his insanity defense, testifying:

> ...I plead not guilty and my reason for pleading not guilty because I wasn't in the State of Louisiana in August--August 30, 1982 the day I was accused of a crime.
>
> ... I wished not to plead guilty by reason of insanity because reason of insanity is telling the court that this person did something he wasn't responsible for something. And to the best of my knowledge I never had no mental illness in my whole entire life and up to this moment I do not have any mental problems. And I advised him to withdraw the plea because it's telling, your're telling the court plainly to plead reasonable insanity. You're looking for a way out.... (Trial Trans. Vol. III, at 851-852).

Petitioner voluntarily determined to pursue an alibi defense. At that point, he put to rest the question of his fitness to stand trial. 1/ The withdrawal of the insanity defense essentially mooted the issue of whether the three previous sanity hearings passed constitutional muster.

Petitioner's reliance on Sandstrom v. Montana, 442 U.S. 510 (1979) is misplaced. In Sandstrom, the Supreme Court reversed a criminal conviction when the trial court improperly instructed the jury by not requiring the state to prove every element of the substantive crime beyond a reasonable doubt. In contrast, the jury in the instant case found that the State proved every element of the substantive crime beyond a reasonable doubt. The rule of Sandstrom simply compels the state to prove guilt beyond a reasonable doubt concerning all the elements of the substantive crime. Moreover, as already noted, the issue is mooted by the Petitioner's withdrawal of his insanity plea for the reasons stated above.

B. The Right to be Provided with Psychiatric Assistance to Prepare a Defense Under the Sixth and Fourteenth Amendments

In this portion of his sixth claim, Petitioner contends that he was "never assigned a psychiatrist to assist him in preparing" for his defense at the original trial or at any of his subsequent appeals. Pet. Br. at 75. Petitioner contends that the denial of psychiatric assistance was in violation of the Supreme Court's holding in Ake v. Oklahoma, 470 U.S. 68 (1985).

In Ake, an indigent defendant had received extensive pre-trial psychiatric evaluation. When the defendant's condition rehabilitated to the point where criminal proceedings could continue, the defendant's attorney informed the Court that the defendant would raise the insanity defense. Defense counsel then requested that the State provide a psychiatrist to examine the defendant concerning his "mental condition at the time of the offense." 105 S. Ct. at 1091. The trial court refused the request. On review, the Supreme Court reversed the trial court's denial of psychiatric assistance and stated:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 1097.

Any valid claims that the present Petitioner may have invoked under the Ake decision became moot when the Petitioner voluntarily withdrew his insanity defense. Here Petitioner "demonstrated to the trial judge" his desire to proceed with an alibi defense and not an insanity defense. Thus, the "significant factor at trial" was whether the Petitioner was in Louisiana on the day of the crime and not whether he needed psychiatric assistance for a defense that he chose not to pursue.

C. The Trial Court's Compliance with the United States Supreme Court's Pronouncement in Pate v. Robinson

Petitioner next avers that following his third sanity hearing on May 7, 1984, various events took place that should have prompted the trial court to order further psychiatric testing and competency proceedings of the Petitioner. The purported events included, inter alia, Petitioner's request that his counsel withdraw his insanity plea, his instructions to counsel not to present an insanity defense, and counsel's motion to withdraw from representing Petitioner. See generally, Pet. Br. at 76-79. These and other factors now lead Petitioner to

assert rights pursuant to the decision in Pate v. Robinson, 383 U.S. 375 (1966).

Pate is another case in a line of decisions in which the Supreme Court has attempted to outline the rights owed under the Federal Constitution to a criminal defendant whose sanity or general competency to stand trial is questioned. In Pate, the Court held that the defendant had not waived the issue of whether he was competent to stand trial due to his possible insanity. Id. at 384. Under those circumstances, the Supreme Court ruled that the Petitioner's "constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial..." Id. at 386.

In the case at bar, Petitioner was accorded three sanity hearings that delved into whether he was fit to stand trial. All three of the commissions answered in the affirmative. The trial court fulfilled the mandate of Pate. Furthermore, Petitioner had no standing with respect to the Pate decision. The trial court had no obligation to order, sua sponte, a fourth sanity hearing simply because, following the third such hearing, Petitioner voluntarily waived his insanity defense and adopted an alibi defense.

D. The Denial of Counsel's Motion to Withdraw and Petitioner's Motion to Replace His Counsel.

Petitoner's final contentions under Claim 6 concern his representation at trial. Invoking Strickland v. Washington, 466 U.S. 668 (1984) and cases following, he claims that the trial court erred in denying both his attorneys' motion to withdraw from the case and Petitioner's motion to substitute counsel.

In Strickland, the Supreme Court established two basic requirements for finding that a defendant has suffered ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

104 S. Ct. at 2064.

To support the claim that his counsel was ineffective, Petitioner cites to various activities that may suggest discord between him and his attorneys. A vast majority, if not all, of the purported events relate to alleged disagreements in strategy and potential conflicts between client and counsel. See, e.g., Pet. Br. at 80-84. In reviewing a similar claim in Petitioner's state court proceedings, the Louisiana Supreme Court properly noted that in United States v. Cronic, ____ U.S. ____ , 104 S. Ct. 2039 (1984), the determination of whether an attorney rendered effective assistance of counsel must concentrate "on the adversarial process, not on the accused's relationship with his lawyer as such." 104 S. Ct. 2046 at n. 21. Despite potential pre-trial disagreements between Petitioner and counsel, the record does not suggest that the adversarial "process los[t] its character as a confrontation between adversaries" that signals the breech of the "constitutional guarantee." 104 S. Ct. at 2045, 2046. Petitioner was accorded effective assistance of counsel in accordance with his sixth amendment rights.

Petitioner next points to the decision Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985) and asserts that the state court should have granted his motion to substitute counsel. Petitioner maintains that the presence of threatening letters and the disagreements between him and his counsel relating to the proper avenue of defense support his claim that his motion to substitute counsel should have been granted. Pet. Br. at 81-84. The facts and circumstances present here indicate that the trial court properly denied the motion to substitute counsel. Every criminal case has the potential for disagreement between the accused and counsel about strategies. What is pertinent to this case is that the court's denial of the motion was correct. Mr. Walker had been representing Petitioner since early 1983. See Trial Trans. Vol. I, at 47. The motion to substitute was heard on March 14, 1984. Trial Trans. Vol. III, at 397-399. By then, Mr. Walker was intimately involved with the case. Moreover, the true basis of Petitioner's fear (which led to the motion to substitute counsel) was unfounded--as discussed by the

Louisiana Court of Appeals in State v. Lowenfield, 450 So. 2d 675, 676 (La. App. 5th Cir. 1984). Although the pre-trial period did not proceed in complete harmony, there has been no showing that the trial court's denial of the motion to substitute counsel or counsel's motion to withdraw was "unreasonable and arbitrary." Mintzes, 761 F.2d 287.

Petitoner's sixth claim is without merit. 2/

Claim 7 The Adequacy of the State Record

In his seventh claim, Petitoner contends that the record is inadequate to determine whether the death sentence was arbitrarily imposed. Petitioner first claims that the transcript did not contain an adequate record of the voir dire proceedings. Therefore, it is contended that the record is inadequate for review on the issue of whether peremptory challenges were used to remove potential jurors on account of their race, in violation of Batson v. Kentucky, ___ U.S.___ , 106 S. Ct. 1712 (1986). In a similar vein, Petitioner avers that the record does not indicate whether potential jurors were excluded due to their opposition to capital punishment. See Witherspoon v. Illinois, 391 U.S. 510 (1968); Pet. Br. at 85.

Petitioner cannot, on the showing made, contest the adequacy of this nine volume record, especially when there was no contemporaneous objection to the alleged error(s). See La. Code Crim. Proc. Ann. art. 841; Engle v. Isaac, 456 U.S. 107 (1982). In Batson, defense counsel made a motion objecting to the use of the challenges. 106 S. Ct. at 1715. Similarly, in Witherspoon, the pertinent statements of the trial court were of record. 391 U.S. at 514, 515.

Petitioner's final argument raised under Claim 7 contests the adequacy of the record as to various issues involving pre-trial hearings and other rulings made during the course of the case. Pet. Br. at 86-87. The proceedings in the present case are memorialized in a detailed nine volume record. Limited issues, aspects, and rulings to which Petitioner did not contemporaneously object cannot

now be raised here. La. Code Crim. Proc. Ann. art. 841; Engle.

The various arguments raised in Petitioner's seventh claim are without merit.

Claim 8 The Trial Court's Jury Instructions Concerning the Use of Circumstantial Evidence at the Guilt Phase of the Trial

Petitioner's eighth claim questions the validity of the trial court's jury instruction concerning criminal convictions based on circumstantial evidence. Petitioner contends that pursuant to La. Rev. Stat. Ann. §15:438, the trial court should have made it clear to the jury that a conviction based on circumstantial evidence must "exclude every reasonable hypothesis of innocence." Petitioner concedes that the desired charge was eventually given; however, he asserts that intervening instructions confused the jury. Pet. Br. at 89-90.

The State contends that no objection was lodged at trial and that Petitioner is barred from raising the issue before this Court. However, regardless of the State's contentions, Petitioner's arguments stressed in Claim 8 are without merit. The trial court instructed the jury that guilt had to be found beyond a reasonable doubt. The court also gave the charge implicit in La. Rev. Stat. Ann. §15:438. Moreover, review of the record indicates that the charges, taken in their entirety, were not confusing. Petitioner's eighth claim is without merit.

Claim 9 Petitioner's Right to Effective Assistance of Counsel

Petitioner's ninth claim raises various factual and legal issues concerning whether he was afforded effective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). Petitioner raises six scenarios that purportedly support the claim that his counsel was ineffective.

1. Petitioner first argues that counsel's failure to move to suppress or otherwise object to the proffering of the murder weapons was both negligent and prejudicial to the Petitioner. Pet. Br. at 95. The Court is not persuaded by this initial contention. The decision to object to the admission of evidence or contest the validity of searches and seizures are decisions made by counsel based

on counsel's trial strategy. So long as the specific decision does not extend beyond the "wide latitude" of practices allowed in the representation of a criminal defendant, Strickland, 104 S. Ct. at 2065, this Court should not interfere with counsel's decision.

As testified to by Mr. Capitelli at the evidentiary hearing held on 12 February 1987, counsel for Petitioner did not object to the proffer of the murder weapons because of his trial strategy. Evid. Hear. at 108, 109. Mr. Capitelli believed that the circumstances surrounding the handling of the murder weapons was a weak part of the State's case. It was his strategy not to raise an objection to the introduction of that evidence but to later argue that the linking of the weapons was one of the weaknesses of the State's case. Evid. Hear. at 108, 109. Thus, the decision was made not to object to the introduction of the weapons. Petitioner's arguments raised under the first scenario are without merit.

2. Petitioner next argues that counsel did not adequately prepare for the sanity hearings. Pet. Br. at 101. However, Petitioner's counsel did attempt to prepare Petitioner for the sanity hearings. Evid. Hear. at 101, 102. Petitioner refused to cooperate in this preparation. Id. This attitude reflects Petitioner's general opposition to putting forth the insanity defense. Trial Trans. Vol. III. at 851-852.

Related to the issue of the insanity defense, Petitioner also argues that counsel was negligent and caused him "actual prejudice" by not raising the insanity defense (apparently at trial). See Pet. Br. at 101-103. Petitioner's argument is that despite the results of three sanity hearings and Petitioner's own insistance upon the withdrawal of his insanity defense, counsel should have girded their loins and proceeded with the insanity defense at trial irrespective of their client's expressed demand that they proceed with the alibi defense. Pet. Br. at par. 220, at 102, 103. This would have caused complete chaos at trial: on one side of the defense table, counsel would have been arguing an insanity defense, while

on the other side of the table Petitioner would be seeking to take the stand in support of his alibi defense. At best, this procedure would have been unacceptable; at worst, it would have been a mockery.

Once petitioner opted for the alibi defense, counsel properly defended him on that basis and did not proceed further with the insanity defense. Each of the issues raised in the second scenario, including the related contentions raised in Pet. Br. at 101-105, are without merit.

3. The third group of facts centers on whether Petitioner was rendered ineffective assistance of counsel due to counsel's alleged failure to "insist upon a proper record." Pet. Br. at 105. Petitioner fails to cite to any authority to substantiate his position. However, the Court finds the nine volume transcript was adequate and preserved the record for reviewing the objections that were properly and timely made by Petitioner.

4. The fourth scenario presented by Petitioner concerns counsel's failure to object to certain jury charges given by the trial court. First, petitioner contends that counsel erred by not objecting to the trial court's instruction relating to aggravating circumstances under La. Code Cr. Proc. Ann. art. §905.4(d). Since it has already been determined that this jury charge was proper, see Claim 1, supra at 3, 4, it follows that counsel's failure to object to the proper instruction could not be in error.

Petitioner also contends that counsel erred by not objecting to jury charges relating to the circumstantial evidence. Pet. Br. at 106-107. Since it has already been determined that the circumstantial evidence instruction was not confusing, see Claim 8, supra at 25, 26, counsel's failure to object to a properly given instruction was not in error.

5. Petitioner's fifth argument raised within Claim 9 contends that counsel failed to proffer mitigating evidence during the sentencing phase of the trial. Pet. Br. at 107. During the evidentiary hearing in this Court, counsel for

Petitioner testified that attempts were made to contact Petitioner's relatives in order to convince them to come to Louisiana to testify. Evid. hear. at 111, 112. However, Petitioner's relatives neither acceded to the request nor did Petitioner desire that they be present. Id. Evidence of Petitioner's employment history was reiterated during the sentencing phase. Id. Counsel's representation of Petitioner at the sentencing phase was not inadequate.

6. The final argument raised under Claim 9 concerns counsel's alleged failure to apprise the various state courts of the relevance of the decision rendered in State v. Williams, 480 So.2d 721 (La. 1985). Petitioner asserts that "had the Louisiana Supreme Court been apprised of the relevancy of State v. Williams to Mr. Lowenfield's conviction...", such would have affected Petitioner's death sentence. Pet. Br. at 108. As noted above in the discussion of Claim 1, this Court is unable to conclude that the Williams decision lends support to Petitioner's cause. See Claim 1, supra, 3, 4. This Court notes that the Louisiana Supreme Court announced its decision in State v. Williams in May of 1985. The decision in Petitioner's case came down from the Louisiana Supreme Court in December of the same year. It is reasonable to conclude that the Louisiana Supreme Court was aware of and "apprised" of its own decision rendered in the same year. Petitioner was rendered effective assistance of counsel and argument six of Petitioner's ninth claim is without merit.

The Supreme Court has observed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 104 S. Ct. at 2064. Here, Petitioner's counsel rendered competent legal services and did not undermine the adversarial process. The various issues raised within the Petitioner's ninth claim are without merit.

CLAIM 10 The Identification Testimony of Diane Fauchaux

Petitioner's tenth claim asserts that the identification testimony of Diane Fauchaux should have been suppressed because it was made after the use of "unduly suggestive tactics" by the police. Pet. Br. at 110. Petitioner claims that the present identification was violative of the principles discussed in Manson v. Brathwaite, 432 U.S. 98 (1977).

On review of this case, the Louisiana Supreme Court considered the Brathwaite decision in light of the facts and circumstances of the present case. The Court concluded that the identification was reliable. Lowenfield, 495 So.2d at 1253, 1254. Applying the same standards of Brathwaite, this Court finds that the identification was reliable and admissable at trial. Witness Fauchaux had an unfettered view of Petitioner. In addition to her visual observations, she noticed Petitioner's accent. Trial Trans. Vol. VIII at 1923. Petitioner's tenth claim is without merit.

CLAIM 11 The Trial Court's Refusal to Permit Petitioner to Recall Anita Jackson to the Stand

Petitioner's eleventh claim centers on whether the trial court erred in denying counsel's request to recall Anita Jackson to the stand. Petitioner contends that said denial was in violation of his sixth amendment and fourteenth amendment rights. Pet. Br. at 112.

It is undisputed that Ms. Jackson was not a suprise witness in the case. Petitioner's counsel knew that Ms. Jackson would testify and was actually given copies of statements that Petitioner's counsel used to conduct its cross-examination of Ms. Jackson. See Trial Trans. Vol. VIII at 1944-1960; Pet. Exh. C. at 51. The trial court's denial of counsel's request did not abridge Petitioner's constitutional rights. Petitioner's eleventh claim is without merit.

CLAIM 12 The Sufficiency of the Evidence for Proving Petitioner's Guilt Beyond A Reasonable Doubt

Petitioner's twelfth claim contends that since his conviction was based on

circumstantial evidence, there exists a "real and substantial doubt" concerning his guilt. Following Jackson v. Virginia, 443 U.S. 307 (1979), the Louisiana Supreme Court rejected this same contention in the course of its careful review. See Pet. Br. Exh. C at 34-36. The review by the Louisiana Supreme Court comported with the guidelines set forth in Jackson. Further, the record contains a sufficient basis for "a rational factfinder...[to] have found the petitioner guilty beyond a reasonable doubt..." Jackson, 443 U.S. at 325. Petitioner's twelfth claim is without merit.

CLAIM 13 The Comparative Appellate Review of Petitioner's Sentencing

Petitioner's thirteenth claim seems to contend that Louisiana statutory law and state appellate procedures violated Petitioner's constitutional rights. Petitioner also makes bald assertions that the comparative review of his case was faulty under Supreme Court guidelines.

The procedures followed by the Louisiana Supreme Court in its comparative review of the present case evince no constitutional infirmities. See Lowenfield, 495 So.2d at 1260-61. On the same note, the Court "cannot say that the punishment is invariably disproportionate to the crime." Gregg v. Georgia, 428 U.S. 153, 188 (1976). Nothing within Louisiana's substantive or procedural laws or its appellate procedures denied Petitioner his federal constitutional rights. Petitioner's thirteenth claim is without merit.

CLAIM 14 Electrocution as a Means of Punishment

Petitioner's fourteenth claim avers that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Pet. Br. at 114. Death by electrocution does not constitute cruel and unusual punishment. Gregg v. Georgia, 428 U.S. 153 (1976); State v. Myles, 389 So.2d 12 (La. 1980). Petitioner's fourteenth claim is without merit.

CLAIM 15 Capital Punishment as an Excessive Penalty

Petitioner's fifteenth claim contends that capital punishment is an excessive penalty. As discussed under Claim 15, capital punishment is not an excessive penalty, per se, and capital punishment is not an excessive penalty within the confines of the present case. Petitioner's fifteenth claim is without merit.

CLAIM 16 Petitioner's Alleged Cumulative Violations as a Source of Constitutional Infringement

Petitioner's final argument asserts that the cumulative effect of the alleged infringements are violative of his constitutional rights. The Court has found that the arguments put forth in each of Petitioner's first fifteen claims do not, independently, mount a constitutional challenge by which this Court could set aside his conviction or sentence. This Court also finds that the collective allegations do not present a constitutional abridgment warranting action by this Court. Petitioner's sixteenth claim is without merit.

More than what these pages reflect has gone into this Court's consideration of the issues raised in this most serious of matters. This Court has been impressed by the diligence and professionalism of able counsel for Petitioner, and, indeed, for the State of Louisiana. A very wide-ranging consideration of all the issues has resulted from their respective input. All considered, the petition must be DENIED. Judgment accordingly.

Signed this 31st day of March, 1987.

Peter Beer

U. S. District Judge

ENDNOTES

1/ It is clear that Petitioner refused to allow his counsel to present an insanity defense. Evid. Hear. at 102.

2/ Intertwined in Claim 6 of the petition, the Petitioner contends that "The Louisiana Courts ... improperly determined that Mr. Lowenfield was competent to stand trial..." Pet. Br. at 67. Unlike the other assertions raised under Claim 6, Petitioner fails to specifically elucidate the error of the Louisiana courts as he has done in arguments A through D. However, whether by impliedly attacking the Louisiana courts' findings as to his competency via individual arguments A through D, or, taken as a whole, all the facts and arguments raised in Claim 6, the Court finds Petitioner's assertion, that the Louisiana courts improperly found him competent to stand trial, is without merit. Petitioner was accorded three sanity hearings. He was found competent by all three commissions. For further elucidation on Petitioner's fitness to stand trial, see the discussion in State v. Lowenfield, 485 So.2d 1245, 1252 (La. 1985). Moreover, Petitioner made the sanity and/or competency issue moot by withdrawing his insanity defense and opting for an alibi defense. Petitioner was competent to stand trial.

Opinion in Lowenfield v. Phelps, No. 87-3305, slip op. (5th Cir. May 11, 1987), on file with Office of the Clerk, United States Supreme Court

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.
905. Capital cases; sentencing hearing required.
905.1. Sentencing hearing jury; commencement.
905.2. Sentencing hearing; procedure and evidence.
905.3. Sentence of death; jury findings.
905.4. Aggravating circumstances.
905.5. Mitigating circumstances.
905.6. Jury; unanimous recommendation.
905.7. Form of recommendations.
905.8. Imposition of sentence.
905.9. Review on appeal.

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure [1] for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Art. 905.2. Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Art. 905.3. Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Art. 905.4. Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(j) the victim was under the age of twelve years.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7. Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman"

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Supreme Court, U.S.
FILED
JUN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

86-6867

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO:

LESLIE LOWENFIELD,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITIONER FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

WILLIAM GUSTE, JR
Attorney General
State of Louisiana

JOHN M. MAMOULIDES
District Attorney
24th Judicial District Court
State of Louisiana

DOROTHY A. PENDERGAST
Assistant District Attorney
24th Judicial District Court
Research & Appeals
Office of the
District Attorney
New Courthouse Annex
Gretna, Louisiana 70053

TABLE OF CONTENTS

	Pages
Statement Of The Case	1
Statement Of The Facts	2
Argument No. 1	2
Argument No. 2	4
Argument No. 3	5
Argument No. 4	6
Argument No. 5	10
Conclusion	12

TABLE OF AUTHORITIES

Pages

State v. Lowenfield, 495 So.2d 1245 (La. 1985) cert. denied, ___U.S.___, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986) 1,2

Lowenfield v. Phelps, United States Court of Appeals, Fifth Circuit (NO. 87-3305) 1

State v. Lowenfield, 495 So.2d 1245 (La. 1985), cert. denied, ___U.S.___, 106 S.Ct. 2259 (1986) 2

Monroe v. Blackburn, 748 F.2d 958, 961 (5th Cir. 1984), cert. denied, ___U.S.___; 106 S.Ct. 2261, 90 L.Ed 710 3

Allen v. U.S., 164 U.S. 492 (1986) 4

Jenkins v. U.S., 380 U.S. 445, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) 4

Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir. 1975) . . . . . .

Brasfield v. U.S., 272 U.S. 448, 475 S.Ct. 135, 71 L.Ed. 331 (1926) 4

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2725, 2735 (1972) 5

Gregg v. Georgia, 428 U.S. 153, 192 96 S.Ct. 2909, 2934, rehearing denied, 429 U.S. 875, 97 S.Ct. 197 (1976) 5

Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2955, rehearing denied, 429 U.S. 875, 97 S.Ct. 198 (1976) . . . . . .

Jurek, supra, ... 5

Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 2742 (1983) 5

Collins v. Lockhart, 753 F.2d 258, 264, (8th Cir.) cert denied, ___U.S.___, 106 S.Ct. 546 (1985). 5

United States v. Cronic, 466 U.S. 650, 104 S.Ct. 2039 (1984) 7

Powell v. Alabama, 287 U.S. 45 53 S.Ct. 55 (1932). 7

Cronic at S.Ct. 20, 41, 2045 7

Cronic at S.Ct. 2046 7

Government of Virgin Island v. Zepp, 746 F.2d 125 (3rd Cir. 1984). 7

State v. Lowenfield, 450 So.2d 675, at 676 8

Pages

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 8

Lowenfield v. Phelps, ___F.2d___, slip opinion, May 11, 1987 9

Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987) 9

State v. Hamilton, 373 So.2d 179 (La. 1979) 10

State v. Weber, 364 So.2d 952 (La. 1978) 10

State v. Narcisse, 426 So.2d 118, 128 (La. 1983). 10

State v. Roy, 395 So.2d 664 (La. 1981) 10

State v. Bennett, 345 So.2d 1129, 1138 (La. 1977) 10

State v. Holmes, 393 So.2d 670 (La. 1981) 10

Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) 10

Patterson v. New York, 432 U.S. 197, 975 S.Ct. 2319, 53 L.Ed.2d 281 (1977) 10

Leland v. Oregon, 343 U.S. 790 (1952) 11

Mulloney v. Wilbur, 421 U.S. 684 (1975) 11

Patterson v. New York, supra 11

U.S. v. Amos, 803 F.2d 419 (8th Cir. 1986) 11

U.S. v. Freeman, 804 F.2d 1574 (11th Cir. 1986) 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

NO:

LESLIE LOWENFIELD,
PETITIONER

VERSUS

STATE OF LOUISIANA,
RESPONDENT

ON PETITIONER FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

STATEMENT OF THE CASE

The United States Court of Appeals, Fifth Circuit, recited the procedural history as follows:

> "The petitioner, Leslie Lowenfield, was convicted of the first degree murder of three persons; the court sentenced him to death on each count on the jury's recommendation. The conviction and sentence was affirmed by the Louisiana Supreme Court, State v. Lowenfield, 495 S.2d 1245 (La. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986). Post conviction relief was denied by the state court. Lowenfield v. Phelps, 497 So.2d 301 (La. 1986). On Lowenfield's application for federal habeas relief, the district court stayed the execution set for November 19, 1986, so it could carefully consider the petition. Following a full evidentiary hearing, the district court denied habeas relief and vacated its earlier stay of execution; it also denied a certificate of probable cause. Lowenfield filed a notice of appeal from the district court's denial of habeas relief, and he sought a certificate of probable cause from this court."

Lowenfield v. Phelps, United States Court of Appeals, Fifth Circuit, (No. 87-3305). Petitioner now applies for writs of certiorari from the United States Court of Appeals, Fifth Circuit, which denied Petitioner's certificate of probable cause and stay of execution.

STATEMENT OF THE FACTS

The United States Court of Appeals, Fifth Circuit, found the facts to be as follows:

"Petitioner, a native of Guyana, came to Louisiana from Canada in June 1981 and met the primary victim, Sheila Thomas, a deputy sheriff in Jefferson Parish, Louisiana, shortly thereafter. Ms. Thomas, along with her young daughter, victim Shantell Osborne, moved in with Lowenfield later in the summer of 1981. Lowenfield and Ms. Thomas lived together off and on for approximately one year. During this year, Ms. Thomas left Lowenfield on three separate occasions and returned to live with her mother. Lowenfield became increasingly bitter following each separation. When Ms. Thomas returned to her mother's home for the last time, he repeatedly threatened and harassed Ms. Thomas and her mother, victim, Myrtle Griffin.

In the late afternoon of August 30, 1982, Owen Griffin, Sheila Thomas' stepfather, was in a vacant lot near his home in Marrero, Louisiana playing cards with friends. Owen Griffin hear shots ring out from his home, and ran to the house and rushed inside whereupon more shots rang out. When the police arrived, they found five bodies sprawled about the living area of the house; they found the bodies of Sheila Thomas, her four-year old daughter Shantell, Owen Griffin, his wife Myrtle Griffin, and Carl Osborne, the father of Shantell. All of the victims had sustained multiple gunshot wounds; each had been shot in the head at close range.

For a more detailed statement of the facts, see the Louisiana Supreme Court's decision in State v. Lowenfield, 495 S.2d 1245 (La. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 2259 (1986)."

Lowenfield v. Phelps, United States Court of Appeals, Fifth Circuit, (No. 87-3305).

ARGUMENT NO. 1

As his first assignment of error, Petitioner suggests that the trial judge coerced a seemingly deadlocked jury into sentencing him to death. Petitioner's assertion lacks a basis in fact or law and should be denied.

The United States Court of Appeals, Fifth Circuit, gave the following factual rendition.:

> "The jury was charged following the guilt phase of the trial on May 14, 1984 at 11:45 a.m.; they deliberated until 7:45 p.m. when the trial court recessed for the night at the jury's request. The jury resumed its deliberations the next day at 10:05 a.m., and returned with its guilty verdicts at 3:05 p.m.
>
> The sentencing hearing, according to Judge Cannella, commenced three hours later, at 6:05 p.m., and concluded at

8:17 p.m. Following the sentencing hearing, the jury deliberated until 11:55 p.m., at which time the trial court recessed for the night at the jury's request. The jury reconvened the next day, May 16, 1984, at 9:40 a.m. Two hours later defense counsel moved for a mistrial arguing that the elapsed deliberation time, five hours, and the last instruction by Judge Cannella at the guilt phase justified a mistrial. Approximately three hours later, counsel reurged their motion. While counsel were arguing their motion for mistrial, the trial judge received a note from the jury indicating that it was deadlocked. The trial court then polled the jury and asked them "do you feel that any further deliberations will enable you to arrive at a verdict?" One juror responded negatively; the balance of the jury answered the question affirmatively. The court instructed the jury to continue its deliberations and repeated parts of its earlier charge, including the statement that if they were unable to reach a verdict, the court would sentence the Petitioner to life imprisonment. Thirty minutes later the jury returned its verdict."

Lowenfield v. Phelps, No. 87-3305, slip op. at 4023 (5th Cir. May 11, 1987). The charges in question are as follows:

> "Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you put in.
>
> In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you (sic) should not hold against either the state or the defendant in this case.
>
> Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

Trial Transcript at 2299.

. . . . . .

> "Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to the individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other.Do not hesitate to reexamine your own views and to change your opinion if your are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room.

Trial Transcript at 2350-51.

Trial judges enjoy wide discretion in determining when to declare a mistrial on grounds of a deadlocked jury. Monroe v. Blackburn, 748 F.2d 958, 961 (5th Cir. 1984).

To amount to a constitutional deprivation, the trial judge's action must constitute coercion that denies the accused a fundamentally fair trial. Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir. 1975).

The constitutional "Allen charge" simply reminds the jury of the nature of their duty and the time and expense of a trial, and urging them to try again to reach a verdict. Allen v. U.S., 164 U.S. 492 (1896).

In Jenkins v. U.S., 380 U.S. 445 85 S.Ct. 1059 (1965), this Honorable Court held that a trial judge's statement, in response to a jury's note on their inability to reach a verdict, that "you have got to reach a verdict in this case" was coercive." Additionally, the Petitioner relies upon Brasfield v. U.S., 272 U.S. 448, 475 S.Ct. 135 (1926), in which the trial judge's actions were deemed reversable error when he inquired into the jury count and was informed by the foreman that it stood nine to three.

Since the instant case is factually different, the trial judge did not abuse his discretion by asking the jury to further deliberate during the penalty phase. The judge's supplemental jury charge was in careful consideration of Petitioner's rights. The trial judge's questioning into whether further deliberations would be helpful was not an inquiry into the numerical division of the jury. One juror responded negatively while the rest answered affirmatively. This response in no way identified the majority/minority count of the jury or invaded the jury's secrecy.

Furthermore, it must be remembered that this jury was deliberating on five homicides. The record does not reflect the reasons for the jurors' problems in reaching five verdicts.

Therefore, since there is no showing of coercion and the record does not demonstrate coercion sufficient to render the trial fundamentally unfair, this claim is without merit.

ARGUMENT NO. 2

Petitioner argues that the single aggravating circumstance upon which his sentence was based, knowingly creating a risk of death to more than one person, is simply a duplication of the aggravating circumstance the state was required to prove to establish his guilt of first degree murder, specific intent to kill more than one person. [1] Petitioner

[1] La. Rev. Stat. Ann. 14:30(3) provides:
First degree murder is the killing of a human being:
(3) When the offender has specific intent to kill or inflict great bodily harm upon more than one person;
La.C.Cr.P. art 905.4(d) provides:
"The following shall be considered aggravating circumstances:
(d) the offender knowingly created a risk of death or great bodily harm to more than one person:

suggests that this aggravating circumstance fails to narrow the class of persons eligible for the death penalty because it does nothing more than duplicate an element of the crime. This ground is without merit and should, therefore, be denied.

Due to the uniqueness of the death penalty, it cannot be imposed under sentencing procedures that create a substantial risk that it would be inflicted in an arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238, 256, 92 S.Ct. 2725, 2735 (1972). This problem is corrected when the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. Gregg v. Georgia, 428 U.S. 153, 192, 96 S.Ct. 2909, 2934, rehearing denied, 429 U.S. 875, 97 S.Ct. 197 (1976). Capital-sentencing procedures do not violate the Eight and Fourteenth Amendments when they provide for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage. Jurek v. Texas, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, rehearing denied, 429 U.S. 875, 97 S.Ct. 198 (1976).

In Jurek, supra, this Honorable Court approved as constitutional the Texas capital sentencing system that narrowed the categories of murderers that can be convicted of the underlying crime to those crimes which included well defined aggravating circumstances. The Court limited its approval, however, to a system that allowed the sentencing authority to consider mitigating circumstances. Id. at 267, 96 S.Ct. at 2950. A sentencing procedure with these elements adequately protects against the wanton and freakish imposition of the death penalty. Zant v. Stephens, 462 U.S. 862, 876, 103 S.Ct. 2733, 2742 (1983).

While Petitioner relies upon Collins v. Lockhart, 754 F.2d 258, 264 (8th Cir.), Cert. denied, ____U.S. ____, 106 S.Ct. 546 (1985), which concluded that there is "no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform the narrowing function (required by the Supreme Court)," he fails to address the controlling opinions of this Honorable Court in Zant V. Stephens, 462 U.S. 862, 103 S.Ct. 2733 (1983), and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, rehearing denied, 429 U.S. 875, 97 S.Ct. 198 (1976). Therefore, Petitioner's reliance on Collins is misplaced.

The Louisiana capital-sentencing scheme provides for categorical narrowing at the definition stage [2] and for individualized determination and appellate review at the selection stage.[3] The narrowing function has been properly achieved in this case by the

---

[2] See La. Rev. Stat. Ann. 14:30 (3) (West).
[3] See La. Code of Crim. Proc. arts. 905-905.9 (West).

aggravating circumstance: knowingly creating a risk of death to more than one person. However, finding that circumstance present in the course of determining guilt did not fix punishment. It only served to permissibly advance the sentencing jury to the stage of weighing mitigating as well as aggravating circumstances in order to make an individualized determination of life or death based on the character of the individual and the circumstances of the crime. The Louisiana procedure adequately differentiates this case in an objective, evenhanded, and substantively rational way from the many Louisiana murder cases in which the death penalty may not be imposed. As an additional safeguard, the Supreme Court of the State of Louisiana reviewed the death sentence to determine if it was excessive.

Therefore, by following the dictates of this Honorable Court in Jurek and Zant, the State of Louisiana constitutionally narrowed the class of those homicides subject to the death penalty. It did so by classifying first degree murder as including certain aggravating circumstances, as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death to only persons whose crimes are accompanied by specific aggravating circumstances. This issue is without merit and should be denied.

ARGUMENT NO. 3

In petitioner's third assignment of error, he claims the trial court erred in denying his motion for substitution of counsel, as well as counsel's motion to withdraw. Both motions were the result of dispute over the proper defense to present at trial. The record indicates that petitioner's counsel, in his judgment, felt the insanity defense as best in this case. Petitioner refused the insanity defense, instead requesting counsel to develope and advance an alibi defense. The trial court properly denied both motions for the foregoing reasons. First removing counsel who was familiar with the case would only result in a disadvantage to petitioner. Mr. Walker had been involved in the case for approximately one year prior to trial. Secondly, the trial court reasoned the that granting of either motion would result in an inordinate delay of the trial as well as incouraging the defendant to employ similar disagreement tactics and seek further delays. The trial judge had no reason to believe petitioner would enjoy a better relationship with a new attorney. Lowenfield v. Phelps, No. 87-3305 U.S.5th Cir. Court of Appeals.

In brief petitioner claims the trial court, in denying his request for substition of counsel, has infringed on his sixth amendment right to effective assistance of counsel. Petitioner's argument rests on the misapplication of the holding in the recent case of

United State v. Cronic, 466 U.S. 650, 104 S.Ct. 2039 (1984). Petitioner attempts to interpret the holding and language used in Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), as the holding of this court in the Cronic case. However, Cronic and petitioners case are factually distinguishable from Powell. In Powell, the trial court appointed all the members of the local bar to represent the defendants. This appointment had the result of no representation of the defendants, until a Tennessee lawyer apppeared on their behalf on trial day. This Court held the defendants were denied their sixth Amendment rights to effective assistance of counsel.

Unlike in Powell, counsel in Cronic, as in the case at bar, were adequately prepared for trial. In Cronic, although only given 25 days to prepare, counsel was able to ready himself for the four day jury trial. Cronic at S.Ct. 20, 41, 2045. In Petitioner's case counsel was appointed nearly a year before the case came to trial and had performed all of the investigations and preparations necessary for trial.

It was not until petitioner and counsel disagreed over the proper defense did Petitioner ask for substitute counsel. It is in light of this disagreement that Petitioner would favor the 10th Circuit could holding in the Cronic case. Wherein the appellate court concluded, "that the circumstances surrounding representation of respondent mandated an inference that counsel was unable to discharge his duties." Cronic at S.Ct. 2046. Cronic, simply stated, does not stand for such implications. Moreover, the facts in Petitioners case indicate otherwise:

> "Counsel testified at the habeas hearing that the motion to withdraw resulted primarily from their inability to persuade petitioner to urge an insanity defense. Mr. Capitelli testified that once the decision was made to follow Lowenfield's wishes and rely on the alibi defense, his relationship with Lowenfield was good." Lowenfield v. Phelps, No. 87-3305 U.S. 5th Cir. Court of Appeals.

Therefore, Petitioner is incorrect in assuming that a disagreement over strategy, between himself and counsel, leads to a presumption of ineffectiveness and, thereby, requires a trial court to substitute new counsel.

Next Petitioner claims there was a "conflict of interest" because of the disagreement over trial strategy. Petitioner erroneously asserts that Government of Virgin Islands v. Zepp, 746 F. 2d 125 (3re Cir. 1984), applies to the facts here. In Zepp, trial counsel was subject to an indictment for similar charges pending against his client. There the Third Circuit found that the potential for a conflict was enough to envoke Sixth Amendment protection. However, in Petitioner's case no conflict, nor potential conflict, existed. As stated above and as counsel testified at the district court habeas hearing, once counsel and petitioner agreed on the defense to present at trial their relationship with Lowenfield was good. The state submits that Zepp is both factually and

legally distingushable from Petitioner's case. Finally, the state would respectfully urge this Honorable Court to follow its well reasoned opinion in Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610, 1615.

> The Court of Appeals' conclusion that the Sixth Amendment right to counsel "would be without substance if it did not include the right to a meaningful attorney-client relationship," 649 F.2d, at 720 (emphasis added), is without basis in the law. No authority was cited for this novel ingredient of the Sixth Amendment guarantee of counsel, and of course none could be. No court could possible guarantee that a defendant will develope the kind of rapport with his attorney-privately retained or provided by the public-that the Court of appeals thought part of the Sixth Amendment guarantee of counsel.

Here, as in Slappy, although there were disagreements between petitioner anc counsel and a meaning full relationship may not have existed prior to trial, Petitioner was well representated. During the handling of Petitioner's motion for substition the trial court found,

> "the charges against Mr. Walker were unfounded and the trial court knew Mr. Walker to be one of the finest criminal attorneys in Jefferson Parish." State v. Lowenfield, 450 So.2d 675, at 676.

The court did not abuse its discretion in denying the substitution motion. It is the state's position that petitioner's claim in this argument is without merit.

ARGUMENT NO. 4

Petitioner complains here that he was denied effective assistance of counsel due to the failure of trial counsel to investigate and present certain mitigating evidence to the sentencing jury: petitioner's mental impairment.

The guidelines for finding ineffective assistance of counsel were established in Strickland v.Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): "First the defendant must show that counsel's performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." Id. at 687, 104 S.Ct. at 2064. The Court further explained that: "(S)trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation. In other words, counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to

counsel's judgments." Id. at 691, 104 S.Ct. at 2066. With these principles in mind, we examine the particular claims of petitioner.

The United States Court of Appeal, Fifth Circuit in its opinion, Lowenfield v. Phelps, ____F.2d____, Slip opinion May 11, 1987, thoroughly analysed this argument as reproduced below:

> Before the sentencing hearing began, Lowenfield and his attorneys discussed whether they should adduce psychiatric testimony. Lowenfield was strongly opposed to it [2] and ultimately persuaded counsel that for tactical reasons this decision was sound. Counsel, at the federal habeas hearing, explained that he believed that the jury had doubts about Lowenfield's guilt that had been difficult for them to resolve. He and Lowenfield concluded that the presentation of psychiatric testimony would telegraph an admission to the jury that Lowenfield had committed the crime and remove any remaining doubts by the jurors of Lowenfield's guilt; they thought that preserving this possible doubt of guilt was more likely to benefit petitioner than psychiatric testimony. Counsel concluded that:
>
> (the presentation of) psychiatric (evidence) would in effect possibly be more detrimental than helpful because what would have happened would be that we'd have the one psychiatrist concerning his possibility of being insane at the time of the crime and they have three or four psychiatrists saying he was sane at the time of the crime and at that point any jurors that may have been misgiven about his guilt would no longer have those misgivings. He (Lowenfield) expressed to me he didn't want to go forward with that. The more I thought about it , the more I examined it, how long the jury was out, I agreed with that.
>
> Habeas hearing record p. 103.
>
> Lowenfield's mental condition was explored as fully as possible by counsel, given petitioner's lack of cooperation. Counsel and the petitioner considered whether the psychiatrists' testimony would undermine the apparent doubt some of the jurors had of petitioner's guilty. They consciously decided that preserving the doubt of guilt would server them better. Considering the deference we must give strategic trial decisions under Strickland, the failure of counsel to call a psychiatrist was not deficient performance. Id. at 689, 104 S.Ct. at 2065-66.
>
> The only other specific complaint of substance about counsel's performance at the sentencing phase of the trial was his failure to call petitioner's relatives to testify on his behalf. The district court credited counsel's testimony that the petitioner did not wish his relatives to be present at the trial and that in any event the family members were unwilling to come to Louisiana to testify. Both of these findings are supported by evidence presented at the habeas hearing. See Habeas record at p. 111.
>
> Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987), relied upon by petitioner, is easily distinguished. In Wilson, counsel did not secure a psychiatric evaluation of his client despite signals that he was suffering from mental defects. Petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect. No other psychological evidence was in the record. Because the district court conducted no hearing, we held that the record did not "contain sufficient evidence from which the district court could determine whether Simmons (counsel) made a considered strategic decision or

[2] Immediately before the sentencing hearing began, Lowenfield, outside the presence of the jury, told the court that he opposed the presentation of psychiatric testimony in this phase of the trial. Transcript at 2306.

whether this decision was reasonable." Id. at 672. We remanded for an evidentiary hearing on the question of whether counsel's performance was effective including whether the decision not to produce psychiatric evidence at the sentencing hearing was considered strategic decision.

In this case the district court conducted a full evidentiary hearing. In contrast to counsel in Wilson, Lowenfield's attorneys fully explained petitioner's mental condition; counsel provoked three separate sanity hearings in which a total of four psychiatrists testified after examining Lowenfield. Counsel was present when each of the psychiatrist interviewed petitioner.

Counsel consulted with psychiatrist, Dr. Richard Richaux, who agreed to testify if Lowenfield agreed to permit it. Counsel consulted with Lowenfield about the desireability of presenting psychiatric testimony at the sentencing hearing and both petitioner and counsel decided against it for strategic reasons which counsel articulated in the hearing.

The record fully supports the district court's conclusion that counsel's representation of petitioner at the sentencing hearing was adequate.

ARGUMENT NO. 5

In this argument, defendant complains that the Louisiana statute, La. R.S. 15:432, which presumes the sanity of the defendant, is violative of Due Process because it unconstitutionally places the burden of establishing incompetancy on the defendant. In the Louisiana scheme:

> "The defendant carries the burden of establishing that he lacks the capacity to understand the object, nature and consequences of the proceedings against him, and that he is unable, in a rational and factual manner, to consult with counsel in a meaningful way, and to assist in his defense. State v. Hamilton, 373 So.2d 179, (La. 1979); State v. Weber, 364 So.2d 952 (La. 1975).

State v. Narcisse, 426 So.2d 118, 128 (La. 1983). A contradictory hearing is required by La. C.Cr.P. art 647 at which time the defendant has the burden of proving by a preponderance of the evidence that he lacks the mental capacity to proceed, State v. Roy, 395 So.2d 664 (La. 1981). The various criteria that should be considered in evaluating defendant's capacity to stand trial were articulated by the Louisiana Supreme Court in State v. Bennett, 345 So.2d 1129, 1138 (La. 1977). Hence, Louisiana provides safeguards to ensure that a defendant without the capacity to understand the proceedings against him or to assist counsel in preparing a defense will not be subject to trial. La. C.Cr.P. art. 641; State v. Holmes, 393 So.2d 670 (La. 1981); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).

Due Process traditonally has required that only the most basic procedural safeguards be observed. The United States Supreme Court in Patterson v. New York, 432 U.S. 197, 975 S.Ct. 2319, 53 L.Ed.2d 281 (1977), said:

"Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here."

The Court further stated that the states may not go beyond constitutional limits so as to label as affirmative defenses some elements of the crimes defined by statutes. In the instant case, the issue of defendant's competence to stand trial is not an element of the crime of first degree murder, but by an affirmative defense which affected whether or not defendant could even go to trial. Since Louisiana provides procedural safeguards to ensure defendant's competency there is no constitutional violation of Due Process.

Although the Supreme Court has never squarely addressed the issue of the burden of proof for competency to stand trial, the Court has addressed the burden of proof for an insanity defense. In Leland v. Oregon, 343 U.S. 790 (1952), the court found that an Oregon statute requiring the defendant to prove insanity beyond a reasonable doubt presented no constitutional infirmity. The Court reasoned that although a plea of insanity was made, the prosecution still was required to prove beyond a reasonable doubt every element of the crime. The Court subsequently confirmed that it is constitutional to burden the defendant with proving his insanity defense in Mullaney v. Wilbur, 421 U.S. 684 (1975). But, later in Patterson v. New York, supra, the Court emphasized that the scheme cannot shift the burden to disprove an essential element of the crime to defendant.

Recently, in two different United States Courts of Appeal opinions, the 1984 Insanity Defense Reform Act's requirement that defendant prove insanity by clear and convincing evidence was held not to violate the Fifth Amendment's Due Process Clause. U. S. v. Amos, 803 F.2d 419, (8th Cir. 1986); U.S. v. Freeman, 804 F.2d 1574, (11th Cir. 1986). Although the issue in the instant case is defendant's competency to stand trial, the analysis is the same. Louisiana offered the defendant procedural methods that safeguarded his rights while his competency to stand trial was determined. The evidence adduced at such hearings does not substitute for evidence needed by the prosecutor to prove beyond a reasonable doubt each element of the crime as defined by the legislature. In the present case the prosecutor still was required to prove beyond a reasonable doubt each element of La. R.S. 14:30, First Degree Murder.

Thus, petitioner's argument herein fails to establish a constitutional violation.

CONCLUSION

Considering the foregoing law and argument Petioner's writ should be denied and a stay of the execution previously set not be issued.

Respectfully submitted,

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

Dorothy A. Pendergast

DOROTHY A. PENDERGAST
ASSISTANT DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
OFFICE OF
THE DISTRICT ATTORNEY
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020

CERTIFICATE

I, **Dorothy A. Pendergast**, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of June, 1987, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On petitioner, Leslie Lowenfield, through his counsel of record, Gary S. Guzy, **KAYE SCHOLER, FIERMAN, HAYS AND HANDLER, 1575 Eye Street, N.W., Washington, D.C., 20005.**

IT IS FURTHER certified that Maurice N. Ross, Jonathan Horn, and Nancy Marshall have been served this 10th day of June, 1987.

DOROTHY A. PENDERGAST

Supreme Court, U.S.
FILED
JUL 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,

v.

C. PAUL PHELPS, Secretary,
Louisiana Department of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOINT APPENDIX

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

GARY S. GUZY *
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 783-1200
Counsel for Petitioner

JOHN A. MAMOULIDES
DOROTHY A. PENDERGAST *
Office of the District Attorney
Twenty-Fourth Judicial District
Parish of Jefferson
Court House Annex
Gretna, Louisiana 70053
(504) 368-1020
Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED MAY 12, 1987
CERTIORARI GRANTED JUNE 22, 1987

TABLE OF CONTENTS

	Page
Chronological Index	1
Trial Court Minutes, 24th Judicial Circuit, Parish of Jefferson	3
Notes Written by Jury, 24th Judicial Circuit, Parish of Jefferson	14
Transcript of Sentencing Proceedings of May 15 and May 16, 1984, 24th Judicial Circuit, Parish of Jefferson	22, 49
Transcript of Evidentiary Hearing of February 12, 1987, United States District Court for the Eastern District of Louisiana	60
Opinion of United States District Court for the Eastern District of Louisiana, March 31, 1987	66
Opinion of the United States Court of Appeals for the 5th Circuit, May 11, 1987	100
Order of the United States Supreme Court granting certiorari and leave to proceed in forma pauperis, June 22, 1987	135

CHRONOLOGICAL INDEX

October 29, 1982	Bill of Information
May 15, 1984	Jury charges in 24th Judicial District of Jefferson Parish, Louisiana
May 15, 1984	Verdict
May 22, 1984	Motion for New Trial
May 29, 1984	Sentencing
July 20, 1984	Notice of Appeal
December 2, 1985	Supreme Court of Louisiana decision affirming conviction and sentence.
May 27, 1986	Petition for Certiorari to United States Supreme Court denied.
August 9, 1986	Application for Rehearing of Petition for Certiorari denied.
September 3, 1986	Death warrant signed for November 19, 1986.
November 12, 1986	Petition for Post Conviction Relief and STay of Execution denied by 24th Judicial District of Jefferson Parish.
November 14, 1986	Petition for Post Conviction Relief and Stay of Execution denied by Louisiana Supreme Court.
November 17, 1986	Petition to United States District Court of the Eastern District of Louisiana for a Writ of Habeas Corpus and Stay of Execution.
November 18, 1986	Stay of Execution entered.
February 12, 1987	Federal District Court evidentiary hearing
April 1, 1987	Petition for Habeas Corpus denied.

April 7, 1987	Death warrant signed by 24th Judicial District for May 7, 1987.
April 25, 1987	Application to Federal District Court for Stay of Execution pending appeal and for a Certificate of Probable Cause to Appeal.
April 30, 1987	Application for Stay of Execution and Certificate of Probable Cause denied.
May 4, 1987	Application to United States Court of Appeals for the Fifth Circuit for Certificate of Probable Cause to Appeal, Stay of Execution, and Motion to Proceed *In Forma Pauperis*.
May 6, 1987	Stay of Execution granted until May 14, 1987, by 24th Judicial District of Jefferson Parish, Louisiana
May 11, 1987	Application for Certificate of Probable Cause and Stay of Execution in Fifth Circuit denied.
May 12, 1987	Petition for Writ of Certiorari and Motion to Proceed *In Forma Pauperis* filed in United States Supreme Court.
May 12, 1987	Stay of Execution granted by Louisiana Supreme Court for thirty days.
May 13, 1987	Death warrant signed by 24th Judicial District for June 17, 1987.
June 10, 1987	Opposition of State of Louisiana to Petition for Certiorari filed.
June 16, 1987	Stay of Execution pending disposition of Petition for Certiorari ordered by United States Supreme Court.
June 22, 1987	Writ of Certiorari and Petition for Leave to Proceed *In Forma Pauperis* granted by United States Supreme Court.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

No. 82-3478

Division "N"

STATE OF LOUISIANA

vs.

LESLIE LOWENFIELD

Date 5-14-84
SANDI BIRD

District Attorney A. Lentini/G. Gremillion

Judges James Cannella

At the hour of 9:55 a.m. court took up the open trial in the above entitled matter.

All present—

Jury returned to the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

Sequestration order placed on witnesses during trial, is now removed, by order of the court.

At the hour of 11:30 a.m. Judge James L. Cannella read charges to the jury.

At the hour of 11:45 a.m. the three alternate jurors were discharged, and the twelve jurors retired to the jury room to deliberate on said charges.

At the hour of 1:20 p.m. Jury returned to the courtroom to ask the court three questions and to request for some evidence.

At the hour of 7:45 p.m. jurors returned to courtroom with note, (filed into evidence) that they are tiring and want to retire for the evening and resume deliberations in the morning.

Court granted jurors request, and recessed for the day, to return on 5-15-84 @ 9:30 a.m.

The jury was ordered sequestered and removed under the custody of the deputy sheriff, and were admonished as to the rules of sequestration. Defendant remanded to N.O.P.P. until 5-15-84 @ 9:30 a.m.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-15-84

At the hour of 10:05 a.m. the court took up the open deliberations as to the verdict in the above entitled matter.

All present—

Jury returned to the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

The court ordered the twelve jurors back into the jury-room to continue deliberating on the charge of R.S.14:30 —first degree murder (5-counts).

At the hour of 1:00 p.m. jurors returned to courtroom with note (filed into evidence) requesting more evidence.

At the hour of 3:05 p.m. the jury returned to the court-room with a verdict:

Verdict returned:

Count 1—(as to Sheila Thomas)—Guilty of first degree murder

Count 2—(as to Shantell Osborne)—guilty of man-slaughter)

Count 3—(as to Carl Osborne)—guilty of first degree murder)

Count 4—(as to Myrtle Griffin)—guilty of first degree murder)

Count 5—(as to Owen Griffin)—guilty of manslaughter)

Signed: Anthony Canzoneri, Foreman

The jury was polled by writing as to their individual verdicts as to all five counts and ordered signed by that juror.

All five verdicts declared legal and ordered recorded.

At this time the jury was removed from the courtroom by the deputy sheriff.

Defense counsel requested to the court a (24) to (48) hour delay of penalty hearing at to the first degree murder verdicts (Ct. 1, Ct. 3, Ct. 4), State objected as to the long delay—court denied defense counsel's request, and ordered court to resume in one (1) hour.

At the hour of 6:05 p.m., court took up the penalty hearing as to counts 1, 3, & 4.

(Out of the Presence of the jury)—W/Leslie Lowenfield
Jury returned to the courtroom under the custody of the deputy sheriff, polling waived.

State Evidence Presented:

S-PH #1—Certified copy certificate of conviction in Canada for aggravated rape

S-PH #1a—Copy of S-PH #1 (amended)—certificate of conviction/acquittel sentence

S-PH #2—Certified copy of #82-3265—State of Louisiana vs. Leslie Lowenfield for harassing phone calls

And all evidence and stipulations introduced at first part of trial.

State rests.

Defense Evidence:

Resubmitted all former exhibits received into evidence in first part of trial.

At the hour of 8:10 p.m. Judge James L. Cannella read the charges to the jury.

At the hour of 8:17 p.m. the twelve jurors retired to the juryroom to deliberate on the penalty hearing.

At the hour of 11:27 pm.. the jurors returned to the courtroom with question (note filed into evidence)

At the hour of 11:55 p.m. the jurors returned to the courtroom with a note (file into evidence) stating that they are tiring and request to retire for the night and to resume on 5-16-84 @ 9:30 a.m.

Court granted jurors request.

The jury was ordered sequestered and removed under the custody of the deputy sheriff, and were admonished as to the rules of sequestration.

The defendant remanded to N.O.P.P. until 5-16-84 @ 9:30 a.m.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-16-84

At the hour of 9:40 a.m. the court took up the open deliberations as to the penelty hearing of the trial:

All present—

The jurors returned into the courtroom under the custody of the deputy sheriff, and were polled by order of the court.

The court ordered the twelve jurors back into the jury-room to continue deliberating as to the penelty hearing of the trial.

At the hour of 11:45 a.m. defense counsel, (out of the presence of the jury), made an oral motion for a mis-trial on the grounds as to the length of time the jurors were taking deliberating as to the penelty hearing:

Motion argued—and submitted—

Court denied said motion.

At the hour of 3:00 p.m., defense counsel (out of the presence of the jury), made another motion for mis-trial on the grounds as to the length of time the jurors were taking deliberating as to the penelty hearing:

D-1/letter received from foreman filed into evidence

Motion argued—and submitted:

Jurors returned back into courtroom—

Court asked jury if further deliberations will be helpful in arriving at a verdict:

Each juror individually polled in writing as to their answer.

(Out of the presence of the jury)—Defense counsel re-urged his motion for mis-trial:

D-2/(in Globo) all twelve slips of paper as to the polling of the jurors, filed into evidence.

Court denied the motion for mis-trial.

At the hour of 3:25 p.m. the jury returned to the court-room with a note (they misunderstood previous question the court had asked).

Court asked again if further deliberations will be helpful in arriving at a verdict:

Each juror individually polled in writing as to their answer (second time) state requested second polling filed into evidence.

At the hour of 4:20 p.m. the jury returned to the court-room with a note stating they have arrived at a decision.

Verdict returned:

Count 1—(as to Sheila Thomas)—the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person

2) The victim was a witness in a prosecution against the defendant and gave material assistance to the state in any investigation of the defendant.

Count 3—(as to Carl Osborne)—The jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person.

Count 4—(as to Myrtle Griffin)—The jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1) The offender knowingly created a risk of death or great bodily harm to more than one person.

The jury was polled by writing as to their individual verdicts as to all three (3) counts and ordered signed by that juror.

All three (3) counts declared legal and ordered recorded.

At the hour of 4:35 p.m. the court recessed for the day and ordered jury released. The court ordered sentencing in this matter set for 5-23-84 @ 9:00 a.m.

Defendant remanded to N.O.P.P. to await sentencing.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-23-84

District Attorney Steve Wimberly

Judge James Cannella

The defendant Leslie Lowenfield appeared before the bar of the court this day represented by Ralph Capitelli and Wayne Walker, attorneys.

The court took up the motion for new trial:

Matter heard—argued and submitted—

Court denied the motion for new trial.

Court continued sentencing date until 5-29-84 @ 9:00 a.m. (Tuesday).

Defendant remanded to N.O.P.P.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

Date 5-29-84

The defendant Leslie Lowenfield appeared before the bar of the court this day after being tried by a jury and found guilty as follows:

Count 1—Guilty as charged to R.S.14:30—first degree murder

Count 2—Guilty to manslaughter

Count 3—Guilty as charged to R.S.14:30—first degree murder

Count 4—Guilty as charged to R.S.14:30—first degree murder

Count 5—Guilty to manslaughter

The defendant was represented by Ralph Capitelli, attorney. Co-counsel, Wayne Walker was not present.

Having exhausted all further delays, the court sentenced the defendant to:

Count 1—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 2—Imprisonment at hard labor for a term of twenty-one (21) years. And the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in

conformity with L.S.A.-R.S.15:824. Defendant is to be given credit for time served.

Count 3—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 4—Death by electrocution, and the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.15:824.

Count 5—Imprisonment at hard labor for a term of twenty-one (21) years. And the defendant is committed to the Louisiana Department of Corrections for execution of said sentence in conformity with L.S.A.-R.S.-15:824. Defendant is to be given credit for time served.

Court ordered that counts two (2) and five (5) of said sentences are to run consecutively with one another.

At this time defense counsel submitted a written motion to withdraw as counsel of record, (as to both attorneys):

Court granted said motion, and allowed E. Wayne Walker and Ralph Capitelli, to withdraw as attorney's for the defendant; and ordered the Indigent Defender Board for the Parish of Jefferson to appoint an attorney to represent defendant through his appeal.

STATE OF LOUISIANA, PARISH OF JEFFERSON
24TH JUDICIAL DISTRICT COURT

(Title Omitted in Printing)

NOTES WRITTEN BY JURY

5-14-84

Evidence Requested:

1. Piece of paper recovered by FBI from Lowenfield.

5-14-84
1:20 PM

Questions

1. Please differentiate between *first* and *second* degree murder.
2. Is a unanimous decision required in all four verdicts?
3. Is expert's opinion to be considered as circumstantial or direct evidence when he uses the words "conclusive" and "no doubt".

Evidence required:

1. Copy of defendant's driver's license (certified copy).
2. Federal gun registration form from K-Mart.
3. Letter to Connie Enclade.
4. Letter sent to Michael Thomas.
5. Rifle box with receipt.
6. 2 exemplars
7. Rifle

8. Posterboard handwriting exhibits (2).
9. FBI arrest picture & date
10. Address book (defendant's)
11. Federal form that was used by FBI (signed "James Best")
12. Blue marker
13. Defendant's drawing of Jacksonville beach area

5-14-84
5:45 PM.

Exhibits Requested:

1. Greyhound Bus receipts (3) for packages sent.
2. Defendant's drivers liscence

5-14-84
7:45 PM.

Judge Cannella

The jury is tiring and requests that we have dinner and retire for the evening.

Anthony S. Conzoneri

11:27 PM
5-15-84

Judge Cannella

Please clarify the word "recomends" on both Verdict sheets. Does this mean that the court will have the option to follow the recomendation or is the court bound to follow the recomendation on both.

If a unanimous decision on either verdict can not be reached, is the defendant automatically sentenced to life imprisonment.

Anthony S. Conzoneri

5-15-84

Judge Cannella 11:55 PM.

The jury is tiring and requests that we be allowed to retire for the night and resume in the morning.

Anthony S. Conzoneri

Evidence Requested

1. All Pictures taken in the bedroom of the murder house
2. Pictures of front of house
3. Picture of broken window of house
4. Photo copy of notebook
5. Drivers liscense
6. Letter to Sheila found in Leslie Lowenfield's apartment.
7. Photo copies of letters

Anthony S. Conzoneri

5-15-84

Judge Cannella at 1:00 PM

The jury is having much difficulty in reaching a unanimous decision. We feel that much of the indecision can be resolved if the jury is permitted to review the following:

1. Drivers Liscense
2. Photo copy of note book
3. Photo copies of letters written by Lowenfield.

Please consider our request as to whether the evidence is sent to the jury room or the jury is returned to the courtroom where it can be presented. Much distress is being experienced.

Anthony S. Conzoneri

5-15-84
3:00 PM

Judge Cannella

The jury has reached a verdict

Anthony S. Conzoneri

5-16-84
3:00 PM

Judge Cannella

The jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath we took.

Anthony S. Conzoneri

/s/ Catherine Robert yes

/s/ Richard N. Velleman yes

/s/ Patricia C. Olson yes

/s/ Eugene Robinson no

/s/ Raphael Asavedo [illegible]

/s/ Catherine Grote no

/s/ Gerald Holland no

/s/ Marc L. Addison yes

/s/ Betty Pugh yes

/s/ Frank Weiland yes

/s/ Anthony S. Conzoneri yes

/s/ Sandy Woodie yes

3:25
5-16-84

Judge Cannella

Some of the jurors misunderstood the question

Anthony S. Conzoneri

/s/ Patricia C. Olson yes

/s/ Raphael Asavedo ????

/s/ Catherine Grote yes

/s/ Betty Pugh yes

/s/ Anthony S. Conzoneri yes

/s/ Richard N. Velleman yes

/s/ Eugene Robinson no

/s/ Catherine Roberts yes

/s/ Gerald Holland yes

/s/ Marc L. Addison yes

/s/ Frank Weiland yes

/s/ Sandra Woodie yes

4:20 PM.
5-16-84

Judge Cannella

The jury has reached a decision -

Anthony S. Conzoneri

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT I

(Sheila Thomas)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

The victim was a witness in a prosecution against the defendant & gave material assistance to the state in any investigation of the defendant.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT III

(Carl Osborne)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON

No. 82-3478, Division "N"

(Title Omitted in Printing)

VERDICT

COUNT IV

(Myrtle Griffin)

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

The offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana, this 16th day of May, 1984.

/s/ Anthony S. Conzoneri
Foreman

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

(Caption Omitted in Printing)

Testimony and proceedings taken in the above numbered and entitled cause, in open Court, for the purpose of a trial, Division "N", May 15, 1985, before the Honorable James L. Cannella, Judge presiding.

PROCEEDINGS

THE COURT: Please call the jurors in.

(WHEREUPON THE JURORS ENTER THE COURTROOM)

THE COURT: Please answer present or here when I call your name.

Richard Velleman.

MR. VELLEMAN: Here.

THE COURT: Mark Addison.

MR. ADDISON: Here.

THE COURT: Frank Wieland.

MR. WIELAND: Here.

THE COURT: Patricia Olsen.

MS. OLSEN: Here.

THE COURT: Catherine Roberts.

MS. ROBERTS: Here.

THE COURT: Betty Pugh.

MS. PUGH: Here.

THE COURT: Anthony Canzoneri.

MR. CANZONERI: Here.

THE COURT: Eugene Robin.

MR. ROBIN: Here.
THE COURT: Rafael Asevedo.
MR. ASEVEDO: Present.
THE COURT: Kathrine Grote.
MS. GROTE: Here.
THE COURT: Gerald Holland.
MR. HOLLAND: Here.
THE COURT: Sandra Woodie.
MS. WOODIE: Here.
THE COURT: Ladies and gentlemen I hope you all had a good night and are rested and ready to go today.

Last night before I ordered you to go back to the hotel room I had certain orders relative to stop deliberating, do not discuss the case anymore until you come back today.

I now remove that instruction and that order from you and I order you to go into the jury room, renew your deliberations and arrive at a verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Counsel would you approach the bench, please?

(COLLOQUY AT THE BENCH)

THE COURT: Ladies and gentlemen in the audience I'd like to remind you of the same thing I did yesterday, I believe it was. The jury is going to come back in and I don't want any comments, any sighs, any noise whatsoever from you during the time that I'm talking with the jury or telling the jury anything. They have not reached a verdict yet but I don't want them to pick up anything from the audience's feelings about this case. Everybody understand? Alright.

Please call them back.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. GREMILLION: Yes, Your Honor.

THE COURT: Mister Canzoneri is that the note that you gave to be handed to me?

MR. CANZONERI: Yes; it is, sir.

THE COURT: Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you've put in.

In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you should not hold against either the State or the defendant in this case.

Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

MR. CAPITELLI: Please read that statement back.

(Whereupon the court reporter reads back the last statement)

MR. CAPITELLI: I note an objection to the Judge's last statement to the jury.

THE COURT: Any motions before the jury comes back?

MR. LENTINI: None for the State, Your Honor.

MR. CAPITELLI: I just want to mention, Your Honor, to caution the audience.

THE COURT: Yes, sir.

Ladies and gentlemen I'd like to please warn you again. Please do not make any comments, any exclamations, have any emotional outbursts before the verdicts are read, after the verdicts are read. Please be very quiet, very still.

Thank you.

Call in the jury.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury relative to their attendance?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: The State waives a polling.

THE COURT: Ladies and Gentlemen of the Jury have you arrived at a verdict?

MR. CANZONERI: Yes; we have.

THE COURT: Please hand it to the clerk.

The State of Louisiana versus Leslie Lowenfield, Twenty-Fourth Judicial District Court, Parish of Jefferson, Number Eighty-two Thirty-four Seventy-eight, Division "N":

Verdict

Count One, Sheila Thomas:

We, the jury, find the defendant, Leslie Lowenfield guilty of first degree murder.

Count Two, Shantell Osborne:

We, the jury, find the defendant, Leslie Lowenfield guilty of manslaughter.

Count Three, Carl Osborne:

We, the jury, find the defendant Leslie Lowenfield guilty of first degree murder.

Count Four, Myrtle Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder.

Count Five, Owen Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter.

Gretna, Louisiana, this fifteenth day of May, Nineteen Eighty-four.

Anthony S. Canzoneri, Foreman.

Do you wish a polling?

MR. CAPITELLI: —wish a poll—

THE COURT: We're going to have a polling of the jury and I'm going to pass out five sheets of paper to each juror. Does anyone not have a pencil or pen? Everybody gets five sheets. Does everybody have five sheets?

Mister Canzoneri you have five sheets?

MR. CANZONERI: Yes, sir.

THE COURT: At the top of the first sheet please write count one. Everybody write count one.

I'm going to read what the jury's verdict is then I'm going to ask you is this your verdict. I need you to write yes or no on the sheet of paper and then write your name.

Count one, Sheila Thomas:

We, the jury, find the defendant, Leslie Lowenfield guilty of first degree murder. Is this your verdict? Write yes or no and then write your name, please.

Please pass them down to the end so we can pick them up.

Then write count two on the top of the next sheet of paper.

This is count two; Shantell Osborne:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter. Is this your verdict? Write yes or no and then your name, please.

Count three; Carl Osborne:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder. Is this your verdict? Please write yes or no and write your name.

Please write count four at the top of the paper.

Count four, Myrtle Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of first degree murder. Is this your verdict? Please write yes or no and sign your name.

Count five reads Owen Griffin:

We, the jury, find the defendant, Leslie Lowenfield, guilty of manslaughter. Is this your verdict? Please write yes or no and sign your name.

Counsel would you approach the bench?

(COLLOQUY AT THE BENCH)

THE COURT: The Court and counsel at the bench have looked over the polling and the Court feels that the polling is satisfied.

Do you have a motion by the State that the verdict of the jury be recorded by the clerk?

MR. LENTINI: Yes, Your Honor. The State so moves.

THE COURT: Granted.

We're going to take a short recess.

Ladies and Gentlemen I'm going to ask you to go into the jury room for a few moments and I'm going to ask you please do not talk with anyone on your way out and on your way back. In the jury room itself please do not discuss the case at all, what's already happened or what's about to happen. Do not discuss any of the legal concepts or principles or anything and then I'll get back to you in a few minutes after I have a meeting with the attorneys before we can decide what we're going to do.

Thank you very much. You can go into the jury room.

(WHEREUPON THE JURY EXITS THE COURT-ROOM)

THE COURT: Mister Capitelli you have a motion?

MR. CAPITELLI: Yes, Your Honor.

Realizing that the verdict of first degree murder requires a sentencing phase on the three counts which were returned on behalf of Mister Lowenfield I request a twenty-four to forty-eight hour delay for purposes to give them time to cool, the jury to cool from the verdict and also in preparation.

MR. LENTINI: Your Honor, the State would object to that request because they've had time to prepare for this eventuality and the State is ready to proceed within an hour.

THE COURT: I'd like to state for the record that I talked with the jurors for a moment to see what their mental and physical state was. Last night, as you recall, at eight o'clock they said that they were ready to eat and they were ready to retire. In other words, they knew what they, know they felt last night and I wanted to go see whether they would be physically and mentally could continue on and in talking with them it was unanimous that they were, that they felt okay, physically, mentally and that they didn't need time to rest. So I have that at my, in my knowledge, also.

Your motion is denied.

MR. CAPITELLI: Respectfully note my objection.

THE COURT: Yes, sir.

I'm going to ask—do you want the courtroom cleared now?

MR. CAPITELLI: Yes.

THE COURT: —that the courtroom be cleared as soon as I get off the bench so that counsel can confer with their client just right in here but also, so that nothing that is said will be heard by anyone else.

Officer would you approach the bench?

(COLLOQUY AT THE BENCH)

(RECESS)

MR. CAPITELLI: Your Honor, at this time out of the presence of the jury I wish to take a note of evidence from Mister Lowenfield and ask that he be sworn in, please, Your Honor.

THE COURT: Please swear him in.

LESLIE LOWENFIELD, I'm housed at Orleans Parish, New Orleans, Louisiana, was called as a witness, after first being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CAPITELLI:

Q Mister Lowenfield you realize that shortly they will be having a sentencing hearing based on the three counts that were returned on first degree murder and in connection with that hearing is it accurate to say that you've instructed me not to put on any psychiatric evidence concerning yourself?

A That's correct.

Q That is your desire and instruction to me.

A Yes, sir.

Q And you also do not wish to testify at this hearing as indicated to me previously.

A Under the circumstances of the hearing, I mean, I wish for thoughts concerning the rephrase the sentence, the hearing if I, if there is anything I have to testify, I will (sic).

MR. CAPITELLI: Let me consult with my client on that point, Your Honor.

THE COURT: Yes.

BY MR. CAPITELLI:

Q As previously stated it is not your desire to testify at this point; is that accurate?

A Yes, sir.

MR. CAPITELLI: No further questions.

THE COURT: Any questions, Mister Lentini?

MR. LENTINI: No questions, Your Honor.

THE COURT: You can step down.

MR. CAPITELLI: Also, Your Honor, let's clarify outside of the presence of the jury. We had discussions with the State prosecutors in this matter and we will be entering the stipulation that the conviction, and the conviction they will enter from Canada will be Leslie Lowenfield was on trial here. He's one and the same individual. We will object to the admissability of the conviction itself. The stipulation will deal with the fact that he is the same individual but we'll object to the admissability. Additionally, we would either stipulate with the State that Mister Lowenfield is the same individual that was booked on violations of R.S. Fourteen, two eighty-five, telephone communications. He subsequently resolved it in a filing of a Bill of Information by the district attorney's office, Case Number Eighty-Two dash Thirty-two sixty five. and again we'd object to the admissibility of the Bill of Information in the matter on the grounds that they should be required to prove the defense itself.

THE COURT: Relative to the two stipulations counsel, Mister Lentini you agree to that?

MR. LENTINI: Yes, Your Honor.

MR. GREMILLION: Your Honor, I understand there's one other stipulation and that's in the aggravated circumstances Section B, the offender, it's been amended to the offender has significant prior history of criminal activity. Since the words, murder, aggravated rape, or aggravated kidnapping do not appear and are not applicable to this situation it is my understanding that both counsel for the State and for the defense have agreed to amend it to the offender has a significant prior history of criminal activity.

MR. CAPITELLI: And to strike all the other words, yes, not apply—

THE COURT: Yes.

Counsel I have shown you each a copy of the general jury instructions for the penalty phase which I intend to instruct the jury on.

Any objection to that?

MR. CAPITELLI: None by the defense.

MR. LENTINI: The State has no objections.

THE COURT: I don't have the verdict forms ready yet but when they are ready I'll let you see them and I'll ask you whether there are any objections to that when I get that.

In addition to that I have prepared a listing of mitigating circumstances, A through H and a listing of aggravating circumstances A, B, and C, and I have shown that to both counsel. Do either counsel have any objection to what I proposed to give to the jury as far as aggravating and mitigating circumstances?

MR. CAPITELLI: Not by the defense.

MR. LENTINI: The State has no objection.

THE COURT: Any other matters before the jury comes back?

MR. LENTINI: No, Your Honor.

MR. CAPITELLI: None.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury or do you wish to poll the jury?

MR. GREMILLION: The State waives the polling.

MR. CAPITELLI: I waive the polling.

THE COURT: Counsel approach the bench.

(COLLOQUY AT THE BENCH)

THE COURT: Ladies and gentlemen this is the phase of the trial, the sentencing hearing.

The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that shall be imposed upon the defendant. You now have the duty to recommend to count one, three, and four, of the indictment whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole, or suspension of sentence. In recommending the sentence to be imposed

you should consider the circumstances of the offense and the character and the propensities of the defendant. At the conclusion of this hearing I will instruct in detail to what the law requires in deciding which sentence is to be imposed.

Go ahead.

MR. LENTINI: Ladies and gentlemen obviously over the past three or four days you have heard most of the evidence in this case. When I say most of the evidence the State did not produce certain evidence during the guilty phase which will be produced during the penalty phase so that you can consider this evidence in arriving at your recommendation to the Judge.

The first thing the State is going to do is reintroduce all of the physical evidence, testimony, and stipulations that were introduced during the guilt phase of the trial and you will have an opportunity if you so wish to review that evidence again. Now we're not going to waive gruesome pictures at you and you saw those pictures. You have an opportunity to see that and any other evidence that you want to see to make your determination.

The other evidence that the State will produce will reflect upon the character and propensities of the defendant.

In order to consider and recommend the death penalty in this case the State must produce aggravating circumstances which are detailed in the statute. Now the aggravating circumstances that the State is relying upon in this case are; one, that the offender has a significant prior history of criminal activity.

Two, that the offender knowingly created a risk of death or great bodily harm to more than one person. Now you will notice that is also an element of first degree murder statute that you have already found to be the case.

And three, that the victim was a witness in a prosecution against the defendant and gave material—gave material assistance to the State in an investigation or

prosecution of the defendant or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material against the defendant. I'm going to produce a certified copy in the official court record reflecting the Bill of Information being filed against the defendant alleging that on August twenty-fourth, nineteen eighty-two the defendant violated R.S. Fourteen Two Eighty-five by willfully instituting telephone calls to Sheila Thomas and therein making threats to kill Sheila Thomas with the intent to coerce, intimidate, or harass said person.

The State will not produce any more witnesses to you or give testimony from the stand. We will introduce another document which will reflect upon the character of the defendant.

MR. CAPITELLI: One moment, Your Honor.

THE COURT: Yes.

MR. CAPITELLI: We waive the opening statement.

THE COURT: Thank you.

Proceed.

MR. LENTINI: Your Honor, that State wants to call Special Agent Mere. Your Honor, the State intends at this time to introduce a document which we will mark State Penalty Hearing, Exhibit Number One, which is a certified copy of a certificate of conviction from the Providence of Ontario, City of Toronto and the Commonwealth of Canada and we're prepared to call witnesses in absence of the stipulation, the document, the authenticity of the document and to the identity of the person who was so convicted in Canada.

MR. CAPITELLI: Your Honor, we will enter into the stipulation that as to the authenticity of the document and as to the individual being the same individual that was on trial but we object to the admissability of the document on the grounds of the, which the State previously—which the Court is aware of.

THE COURT: Are you offering that at this time?

MR. LENTINI: Your Honor, so at this time the State offers the Canadian conviction for attempted rape and I have copies I would like—

MR. CAPITELLI: May we approach the side bar for one moment?

THE COURT: Yes.

(WHEREUPON DISCUSSION WAS HELD OUTSIDE THE PRESENCE OF THE JURY)

MR. CAPITELLI: Judge, I want to clarify it. I did this because the original that was introduced is not going to be shown to the jury and the copy is altered because the portion count, 2 A is eradicated. That is both agreed with the defense counsel that we preferred it going in that way.

MR. LENTINI: Just for the record we'll introduce a copy of the copy the jury is going to see which does not contain count two which is a weapons charge and subsequently reversed by the Supreme Court in Canada. That has been removed from the copy and I'll offer it as a state penalty hearing exhibit. One A.

MR. CAPITELLI: And just again to clarify admissability on the grounds it being a former decision and other grounds.

THE COURT: Do you want to put any other details of your objection into the record?

MR. CAPITELLI: It is—I'm uncertain whether all of the constitutional provisions and protections under the United States Constitution were provided to Mister Lowenfield in the Canada conviction and, therefore, that is the real thrust of my argument that the conviction should not be admitted.

THE COURT: The conviction is over ruled.

MR. CAPITELLI: Note my objection.

MR. LENTINI: The State will also introduce State Penalty Hearing—

THE COURT: One minute. The other ducment. Let it be received into evidence.

Go ahead.

MR. LENTINI: The State will also introduce State Penalty Hearing Exhibit Number Two which consists of a certified copy of criminal court record eighty-two thirty-two sixty-five for the Twenty-Fourth Judicial District Court which is the Bill of Information charging harassing phone calls on August twenty-fourth, nineteen eighty-two and I understand that the defense joins in the stipulation that the person so charged under this Bill of Information is the defendant, Leslie Lowenfield.

MR. CAPITELLI: Your Honor, we so stipulate and again note an objection as to the admissability of this document.

THE COURT: Yes. Let it be received into evidence.

MR. LENTINI: The State will also offer, file, and introduce all of the stipulations, testimony, and exhibits which are entered into the guilt phase of the trial.

MR. CAPITELLI: And I would request that all of my previous objections to said evidence be noted again for this phase for my client's rights to be totally protected for that.

THE COURT: Yes.

Let it be received into evidence.

MR. LENTINI: Your Honor, with the Court's permission I would like to provide the jury with copies of the Canadian conviction and, also, let them review the true copy of the pending Bill of Information and, also, the letters, the original letters and, well, State's Exhibit Ninety One, One Zero Nine, Eighty Four, Eighty Six, Eighty Five, and Ninety Two. I'd like the jury to have an opportunity to view this if they so wish.

MR. CAPITELLI: Your Honor, I request that we approach side bar for one point.

THE COURT: Yes.

(WHEREUPON DISCUSSION WAS HELD OUTSIDE THE HEARING OF THE JURY)

MR. CAPITELLI: I'm going to object specifically to the admissability of the original uncensored, unedited, letter and note pad on the following grounds;

One, in the trial these documents are scrubbiously (phonetic) edited as being read to the jury and not introduced. I think at this point the objection to them being admitted is for that same reason editing wasn't done. Now and in particular I would like to note I believe there were references to arrests in those letters and notebook which do not apply to the single arrest on August twenty-fourth, for the harassing phone calls as mentioned by the State in the original statement and, also, to the arrest which the defense has not been notified of as constituting aggravating circumstances in the offense and I object to them being shown to the jury.

MR. LENTINI: Your Honor, the State's response is that the writing reflects the character and propensities of the defendant were written in his own hand and sent voluntarily to the individual. He has no rights to expect that information would not come forward in the penalty phase as it is not information that has been supplied by the State or any, on the grounds of the State.

THE COURT: Objection overruled.

Your request is granted Mister Lentini.

MR. CAPITELLI: Please note my objection.

MR. LENTINI: Your Honor, the State has no further evidence to present on the penalty phase. The State will rest.

THE COURT: Okay.

Counsel in the meantime I've gotten back the verdict forms and I think I have shown it to counsel. Anybody have an objection to the verdict form proposed by the Court?

MR. LENTINI: The State has no objection.

MR. CAPITELLI: No, Your Honor.

THE COURT: Go ahead Mister Capitelli.

MR. CAPITELLI: Your Honor, we submitted the exhibits that were offered in the first portion, in the trial portion.

THE COURT: Any objection?

MR. LENTINI: No objection.

THE COURT: Let it be received into evidence.

MR. CAPITELLI: Based on that we rest.

THE COURT: Thank you.

Ladies and gentlemen we're going to have closing arguments by the State, then the defense, and the State then I'm going to give you the jury instructions and then I will order you to go into the jury room and deliberate and arrive at a verdict.

We'll begin with the closing arguments by the State. Mister Gremillion.

MR. GREMILLION: Thank you, Your Honor.

Ladies and gentlemen during this stage of the proceedings the State has the burden to prove one or more aggravating circumstances for the consideration of the death penalty, just giving you evidence to look at, view. We've produced for you and ask you to look at three aggravating circumstances.

First of all, one of the aggravating circumstances is the victim was a witness in a prosecution against the defendant, gave material assistance to the State and any investigation or prosecution of the defendant or was an eye witness to a crime alleged to have been committed by the defendant or possess other material evidence against the defendant.

We've introduced State Two which shows that six days before these murders occurred the defendant threatened and violated R.S. Fourteen Two Eighty-five by willfully instituting a telephone call to Sheila Thomas and therein making threats to kill Sheila Thomas with the intent to coerce, intimidate, and harass that person. This is not a conviction. It shows that Sheila Thomas would have been part of that investigation and a victim.

Secondly, the State has introduced a document from Canada. It's a certificate of conviction when the defendant, Leslie Lowenfield, was convicted of attempted rape in Canada back in nineteen seventy-four. It shows the compensity to commit crimes and his significant record. That is another aggravating circumstance.

Thirdly, you have already convicted him of three counts for first degree murder.

Third and last aggravating circumstance we've given you is the offender knowingly created a risk of death and great bodily harm to more than one person. Your verdict found that. You need to reconsider that.

When we began this trial Mister Lentini and I asked each juror and received a commitment from each and everyone of you during voir dire and we were asking you questions that you could and would reconsider the imposition of the death penalty. We ask that you look at it under each circumstance and the facts of each case.

Now ladies and gentlemen this case is in your hands and I ask you to consider the penalty of death.

Thank you.

THE COURT: Thank you.

Mister Capitelli.

MR. CAPITELLI: Ladies and Gentlemen I wish to thank you for your attentiveness during the sentencing phase and also thank you for not rushing to judgment which you didn't do and I know you didn't do. And I know that you suffered and struggled during the decision making portion as you did, as you promised you would under your oath.

The only thing I ask now is that you are able to listen to me with an open mind and an open heart and consider the alternative as you told me you could consider the alternative for whatever reasons you feel are justified, your own moral or religious beliefs or whatever reasons you feel are justified and render a life sentence in this case.

I'd like to address a couple of points briefly. First of all, this is not a conviction; this is an arrest for a harassing phone call. If you looked on the back the charge isn't even filed until October, a month and a half after this incident. I don't believe anyone truly believes that the reason for this, you know, as the jury found your verdict, I'm not questioning the verdict, that the reason for

this was the harassing phone call that she was a witness on. I don't think anyone believes that. I don't think that adds anything to your consideration. This conviction from Canada is attempted rape, it's in Canada. It's for a two year sentence. Mr. Lentini and Mr. Gremillion had the chance to question Mr. Lowenfield on the stand about that. They chose not to. But I don't think that enters into your decision either. The decision is what you had before you, that's the case. The case is what you had the first time and you know the facts. I'm not going to go into great detail with the facts. I do feel that you did not, as I stated, rush to judgment. You did not—you looked at the evidence and I know, I know that you had some concern, some doubts. I know those of you who had expressed the doubts just by the nature of this case I have to feel that you had doubts. Maybe in your minds those doubts did not reach the level of a reasonable doubt but any doubt would be significant enough for each of you to consider not coming with the death penalty. That you will have to look whatever time from now and know when this execution is rendered that your decision had a doubt with it. You went for thirteen hours and obviously there were significant things that you discussed, the things in your heart because I know each of you took this so seriously in your heart you had trouble with it.

MR. LENTINI: Excuse me, Your Honor, I'm sorry but, Your Honor, I have to make an objection at this point. I think that the only thing that is relevant at this stage is not a comment on the evidence of the guilt points but only mitigating circumstances which would have a bearing on the penalty, possible penalty, that the jury would recommend. I think Mister Capitelli is commenting on the quality of evidence. The jury has already decided that.

MR. CAPITELLI: Your Honor, I think anything that is introduced, introduced all the evidence back in this case, they introduced the whole, all their exhibits be

reconsidered again, all the arguments be reconsidered again.

THE COURT: Overruled.

MR. CAPITELLI: Thank you, Your Honor.

I think you did have doubts. I think that you were not satisfied. I know no one could be satisfied with the police work that was done in this case. I don't think anyone of you wants to give a stamp of approval of that type of work. I know you struggled because of that and had to overcome that and you don't want a stamp of approval on that so that other juries may have to suffer with the same type of problems in a case.

Each of your verdicts here is important. Each one of you is entitled to hold and I ask you if there is only one, if there's only one person here that feels that the death penalty is not, I hope there are more, but if there's only one that you hang to your convictions as you're entitled to do.

The Judge is going to read you about in the charge that you not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or the mere purpose of returning a verdict. If you are unable to unanimously agree on a verdict the recommendation of the Court will enter a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence. So if one of you feels those doubts are significant to you, maybe not to other jurors, to you, I ask you to cling to that and you're entitled to cling to that belief and cling to your opinion. Each one of you is entitled to do that.

This isn't very easy for an attorney to get up here and argue to save someone's life. It's a very difficult thing. You wonder whether the Lord is going to give you the words that are enough to convince for all the people sitting here that you can't converse with that you can just look at and try to feel, to try to come up with something why they—why they feel that there should be consideration given. You look at the morality of this—

of the death sentence. Each of you I asked about religions. I know we have Mormons, Lutherans, I think, Episcopalians, a number of Catholics, majority are on the jury and each of you I asked your religious beliefs because when it came down to this I wanted to be able to talk to people who I felt had religious convictions and thought deeply about matters like this. And I know each of you truly does.

What is the death penalty for? Is it a deterrent? If you come back with life he's going to be sentenced to three life sentences without benefit of parole, probation, or suspension of sentences and the possibility of twenty-one years on each of the other two manslaughter counts. Is that any more of a deterrent? Is it retribution? Is it to say now that vengeance, hatred, that we should spill out and kill more, have retribution for what was done? If you could bring back any of those people maybe you would say yes but it can't do that. I wish to God it could but it can't. We can't bring any of them back no matter what happens. And is more death and more hatred going to count? I don't think so. I don't think that each of you in your heart feels that that is something that—that you should do. I hope—I hope I'm right about it. In going over this when I first got appointed to this case I said what if it comes to this, what if it comes to this stage. What do you say—what do you say to jurors and at one point the best example I can give and my religion is Catholic as some of you are on the jury and I can only relate to my own religion as best and I came home one day and I saw a magazine article and the magazine article, the cover of the magazine article said why forgive. And it had the Pope forgiving the assassin that had tried to kill him. And my first reaction was, well, why should he do that and I walked off and left it. And then several days later I looked at it again and read the article and I said why should he forgive. Because your initial reaction of hatred and vengeance and to strike back although it's a human

trait is the wrong thing. We're not the ultimate judges of anything. It's the wrong thing to do. And then several days later when I looked at it and I read it again I said why forgive, that is the right thing to do.

I ask for his life.

MR. LENTINI: Ladies and gentlemen I'm going to be very brief because I know you've heard a lot this past week.

I have do doubt of the sincerity of the abled defense attorneys for this defendant. I'm going to tell you I do not think that it is my place or his place to tell you what to do concerning the penalty of this case. It's very easy for someone on the outside who has not taken the oath that you have taken to say, well, this is what I would do. This is what I think is the proper thing. It's very easy to—You have a very difficult decision to make.

There are two things you can do. You can avoid it and I don't think anybody would blame you. The way to avoid is simply not to consider the death penalty, simply not do the thing that you told us you would do after you were sworn and during the jury selection phase and nobody would blame you for that because it is a difficult decision and those decisions are very tough for you to face. I'm not asking you to do one or the other. I'm simply asking you to consider it, consider both and decide within your own heart and mind what is appropriate. We can talk about religion and you can find examples of forgiveness and you can find examples that say that there are certain penalties that are appropriate for certain crimes. The penalty that you recommend—the penalty that you recommend has nothing to do with any forgiveness that anyone has to give for this man. That is between him and a higher authority.

I just ask you to consider the appropriate penalty for one who snuffs out the lives of five human beings. Consider the appropriate penalty in your own hearts for one who not only has taken five lives but someone who has taken and killed a part of so many other people.

None of us walk the face of this earth without affecting other people, relatives, friends, co-workers, all of those people have been part of them that has been killed in addition to the victims.

And what is the appropriate penalty for one who does that? Does society have a right to say there are some crimes—there are some crimes that demand the ultimate penalty? That's something you have to decide. It's very easy for me to tell you what I would do. I'm not in a position. I'm simply asking you to consider it. Consider both for every decision that you arrive at. No one will be able to quarrel with you because you have been an exemplary jury. You have been attentive. You have gone through a lot and you have considered this case very carefully. And I just ask you to do that a little bit longer. Consider the appropriate penalty.

Thank you.

THE COURT: Ladies and gentlemen you must now determine relative to counts one, three, and four of the indictment whether the defendant should be sentenced to death or life imprisonment without benefit of probation, parole, or suspension of sentence. You must consider the circumstances of each offense and the character and propensities of the defendant in determining the sentence to be imposed. When the attorneys on both sides stipulate as to the existence of a fact the jury must regard that fact as proven.

In reaching your decision regarding a sentence to be imposed you must be guided by these instructions. Relative to counts one, three, and four of the indictment you will require to consider the existence of the aggravating and mitigating circumstances in deciding which sentence should be imposed. That statutory aggravating circumstances are:

(A) The offender has a significant prior history of criminal activity;

(B) The offender knowingly created a risk of death or great bodily harm to more than one person;

(C) The victim was a witness in a prosecution against the defendant, gave material assistance to the State in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

You will be furnished with a list of the statutory aggravating and mitigating circumstances which you may take with you during the deliberations. Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exists. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed you may consider imposing a sentence of death. If, however, you do not unanimously find beyond a reasonable doubt that any of the statutory aggravating circumstances existed then life imprisonment without benefit of probation, parole, or suspension of sentence is the only sentence that may be imposed. Even if you find the existence of the aggravating circumstance you must also consider any mitigating circumstances relative to counts, one, three, and four of the indictment before you decide that a sentence of death should be imposed. The law specifically provides certain mitigating circumstances. They are:

(A) The offender has no significant prior history of criminal activity;

(B) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(C) The offense was committed while the offender was under the influence or under the domination of another person;

(D) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(E) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or

to conform his conduct to the requirements of law was impaired as a result of a mental disease or defect or intoxication;

(F) The youth of the offender at the time of the offense;

(G) The offender was a principal whose participation was relatively minor;

(H) Any other relevant mitigating circumstance.

However, in addition to those specifically provided mitigating circumstances you may also consider any other relevant mitigating circumstance. You are limited only to those mitigating circumstances which are defined. You may consider any other relevant circumstances which you feel should mitigate the severity of the penalty to be imposed. The fact that you are given a list of aggravating and mitigating circumstances should not cause you to infer that the Court believes that any other circumstances do or do not exist. The law requires that the jury be given such a list in every case. Whether any aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented.

In addition to the evidence presented at this sentencing hearing in deciding the sentence to be imposed you may consider evidence presented during the guilt determination trial.

I will ask the clerk to hand the jury six blank forms of verdicts. The first three verdict forms relate to counts one, three, and four and read:

Having found the below listed statutory aggravating circumstance or circumstances and after consideration of mitigating circumstances offered the jury recommends that the defendant be sentenced to death.

In the event you unanimously decide the death penalty should be imposed a space is provided to write the statutory aggravating circumstance or circumstances that you unanimously find to exist. The foreman must sign the form.

The second of these forms of verdicts relate to count one, three, and four and read:

The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence. If the jury decides that a life sentence without benefit of probation, parole, or suspension of sentence should be imposed the foreman need only sign that form of verdict. No listing of aggravating or mitigating circumstances is required.

Nothing said or furnished you in these instructions should be taken as a opinion of the Court as to the existence or not of statutory aggravating or mitigating circumstances or as an opinion concerning the appropriate sentence to impose. It is your responsibility in accordance with the principles of law I have instructed to determine whether the defendant should be sentenced to death or to life imprisonment without benefit of probation, parole, or suspension of sentence. The Court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation the Court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

When you enter the jury room it is your duty to consult with one another to consider each others views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment. Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to re-exam your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Members of the Jury you will now retire to consider your verdict.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Ladies and gentlemen there's no verdict yet. They have a couple of questions.

(WHEREUPON THE JURY ENTERS THE COURTROOM)

THE COURT: Counsel you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: The State waives a polling.

THE COURT: Mister Conzaneri are these two questions or two paragraphs that you submitted to the Court?

MR. CONZANERI: Yes, sir.

THE COURT: Judge Cannella please clarify the word recommends on both verdicts sheets. Does this mean that the Court will have the option to follow the recommendation or is the Court bound to follow the recommendation on both.

The Court is bound to follow the recommendation on both.

If an unanimous decision on either verdict cannot be reached is the defendant automatically sentenced to life imprisonment?

The defendant is automatically sentenced to life imprisonment without benefit of pardon, parole, or suspension of sentence. The answer to the second one is yes.

You can retire to the jury room.

(WHEREUPON THE JURY EXITS THE COURTROOM)

THE COURT: Ladies and gentlemen they have not reached a verdict yet so please do not make any comments whatsoever when they're in court.

Please bring them back.

Counsel do you waive a polling of the jury?

MR. LENTINI: Waive a polling, Your Honor.

MR. CAPITELLI: Yes, Your Honor.

THE COURT: Mister Canzoneri is the note that wrote?

MR. CANZONERI: Yes; it is.

THE COURT: I've read the note and discussed it with counsel and I'm going to grant your request. Is there any way you could continue deliberating tonight and arrive at a verdict?

MR. CANZONERI: I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired. I just—we as a unit felt that we could better continue after resting.

THE COURT: I'm going to grant your request.

I'd like to remind you, please, on your way out tonight and on your way back tomorrow please do not talk with any attorneys, investigators, defendant, or witnesses in the case. Please do not discuss the case among yourselves yet from now until you come back into the jury room tomorrow. Please remember what you have seen and what you have heard and have a good night's sleep. We'll start tomorrow morning at nine-thirty.

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

[Title Omitted in Printing]

Testimony and proceedings taken in the above numbered and entitled cause for purpose of trial on Wednesday, May 16, 1984, before the Honorable James L. Cannella, Judge presiding.

PROCEEDINGS

THE COURT: Please call them back in.

(WHEREUPON JURORS ENTER THE COURTROOM)

Good morning, Ladies and gentlemen. You all look a lot better now than you did last night.

Would you please answer here or present.

Richard Velleman.

MR. VELLEMAN: Here.

THE COURT: Marc Addison.

MR. ADDISON: Here.

THE COURT: Frank Weiland.

MR. WEILAND: Here.

THE COURT: Patricia Olson.

MS. OLSON: Here.

THE COURT: Catherine Robert.

MS. ROBERT: Here.

THE COURT: Betty Pugh.

MS. PUGH: Here.

THE COURT: Anthony Conzoneri.

MR. CONZONERI: Here.

THE COURT: EUGENE ROBINSON.
MR. ROBINSON: Here.
THE COURT: Raphael Asavedo.
MR. ASAVEDO: Present.
THE COURT: Catherine Grote.
MS. GROTE: Here.
THE COURT: Gerald Holland.
MR. HOLLAND: Here.
THE COURT: Sandra Woodie.
MS. WODDIE: Here.
THE COURT: Last night when we recessed for the evening I told you to not discuss the case anymore among yourselves until you came back today. I now remove that restriction and I order you to retire to the jury room to consider your verdict.

(WHEREUPON JURORS EXIT COURTROOM TO DELIBERATE)

(RECESS)

(RECESS OVER)

THE COURT: Mr. Capitelli, you have a motion?
MR. CAPITELLI: Yes, Your Honor.
Please note the jury is not present and this motion is taken outside the presence of the jury.
On behalf of Mr. Lowenfield I will make a formal motion to the Court to declare the Sentencing Phase at this time a Mistrial or Hung Jury and that the jury be dismissed.
The reasons I will state as follows:

The jury has been out today, Wednesday the Sixteenth of May over—well over two hours. Last night well over three and a half hours and again was sequestered last night. after deliberating in excess of thirteen hours on the Guilt Phase.
The length of time is such that it compels me to move for this mistrial, request for a mistrial.

Additionally, I would note that the last instruction by Judge Cannella on the Guilt Phase was a strong instruction that I objected to and I feel that it may have had a residual effect on the Sentencing Phase and I'd like to move for a mistrial at this time.

MR. LENTINI: Your Honor, I don't think that there is any indication from the jury that they are unable to reach a verdict. I think the indication has been that they are carefully considering what their recommendation would be and I believe that Mr. Capitelli's requested several times that they not rush to judgment, that they carefully consider it. Until we get come sign that they are hopelessly deadlocked and not making any progress I think we should let them deliberate.

THE COURT: This jury has shown a propensity to— It has taken my instructions as far as writing notes and letting me know by the questions that they asked and the comments they had; so, they have shown that they are not going to hesitate to say something if they are stuck or for any reason and they have come forth with those questions or comments during the penalty phase.

So, I'm satisfied that they are still working towards the verdict, until they tell me something different.

Your motion is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Yes.

Court will be in recess

(RECESS)

(3:05 PM)

MR. CAPITELLI: May it please the Court, Your Honor, I'd like to note first that the jury is not present and the Defendant, Mr. Lowenfield, is present.

Your Honor, it is my intention to reurge my motion that the mistrial be declared because that the jury is hopelessly hung and that is based on the time frame and my observations of the jury which I feel is in ob-

vious distress since requesting that the Court convene for the purpose of that motion; the Court has received a note from the jury which I wish to be made part of this particular motion and in which I think substantiates my observations and feelings about the need to declare a mistrial at this point, Your Honor.

THE COURT: Mr. Lentini.

MR. LENTINI: Yes, Your Honor.

The note indicates that the jury would like to be brought back into Court. It has a question. I think under the circumstances it would be premature to rule on the motion Mr. Capitelli raises until we abide by the request of the jury.

I would also like to note that in Chambers we agreed on a procedure that would be employed in questioning this jury as to whether or not they are deadlocked and I ask for a stipulation from Mr. Capitelli that the procedure to be followed will be that the Judge will read the last sentence of the instructions that were given on the Penalty Phase to the jury and we'll ask if they have reached a verdict on any of the Counts and if not we'll ask the Foreman to give if there is any possibility that further deliberation will be beneficial and each juror will have a piece of paper on which they can write their opinion concerning the advisability of further deliberation.

Is that a correct statement, Mr. Capitelli?

MR. CAPITELLI: Your Honor, Mr. Lentini is accurate in what I stated would be agreeable as a stipulation but I'd want a ruling first on my motion which preceeded the note which states that the jury is having great distress and is unable to reach a decision at this point. There is great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and oath it took. Signed the Foreman. I think that note in itself in connection with the time involved and I think the distress that they've gone through

enough should be sufficient for the Court to grant a mistrial in this matter.

THE COURT: Motion is denied.

Approach the bench, Please, Counsel.

MR. CAPITELLI: Please mark the note as Defense Exhibit One.

MR. LENTINI: Your Honor, as far as using the note and marking it on his motion, Mr. Capitelli states that his motion preceeded the note and I don't think the note should be entered in connection with his motion.

The note is requesting that the jury come back in and be further instructed by the Judge.

MR. CAPITELLI: I make the request that the note be incorporated with my motion since the note came to light in the course of us preparing to come back into Court and hear my motion and I ask that it be incorporated with my request.

THE COURT: Your request is granted.

Let it be received in evidence.

Any other motion before the jury comes back in?

MR. CAPITELLI: No, Your Honor.

MR. LENTINI: None from the State.

(WHEREUPON JURORS ENTER COURTROOM)

THE COURT: Counsel, do you waive a polling of the jury?

MR. CAPITELLI: Yes, Your Honor.

MR. LENTINI: State waives the polling.

THE COURT: Mr. Conzoneri, is that the note you recently handed the Bailiff?

THE FOREMAN: Yes; it is.

THE COURT: Mr. Conzoneri, I'd like you to answer the question that I have and I'd like you to only answer it yes or no: Does the jury have a verdict on any Count?

THE FOREMAN: No, sir.

THE COURT: Ladies and Gentlemen as I instructed you earlier if the jury is unable to unanimously agree

on a recommendation the Court shall impose a sentence of Life Imprisonment without benefit of Probation, Parole or Suspension of Sentence.

The procedure I'm going to go through is I'm going to aska question and I'm going to ask Mr. Conzoneri to please give me the anser to the question. Then I'm going to pass out pieces of paper to each juror, and I'm going to ask them to write their nam on the piece of paper and write your individual answer to the question on the paper. Then we'll pick that up.

The question is: I ask you if further deliberations would be helpful in obtaining a verdict.

Mr. Conzoneri, could you please answer that question.

THE FOREMAN: Yes, sir.

THE COURT: Please pass out the papers.

On those pieces of papers if you would please put down your named down and then if you please answer that same question: If further deliberations would be helpful in obtaining a verdict? What is your answer to the question?

MR. CAPITELLI: May I approach the bench, Your Honor.

(COLLOQUY AT BENCH)

THE COURT: Ladies and gentlemen, I'm going to ask you to step into the jury room, please for a minute.

(WHEREUPON JURORS EXIT COURTROOM)

MR. CAPITELLI: Your Honor, may it please the Court, at this time, based on the answers from the jurors that fully Four of them are unable to feel that any further deliberation would be of any value, I reurge my motion for the Court to declare a mistrial and offer, introduce all Twelve slips of the jurors as a Motion Defense Motion Number Two in globo, all Twelve of the slips of paper in supprt of that request.

THE COURT: Any objection to the introduction to the slips, Mr. Lentini?

MR. LENTINI: No objection.

THE COURT: Let them be received in evidence.

What is your position relative to the request for a mistrial?

MR. LENTINI: State would oppose it, Your Honor.

THE COURT: This is the first time that the jury has requested or has stated that they are having trouble arriving at a decision relative to the Penalty Phase.

The Motion is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Yes.

I've told Counsel what I propose to say to the jury when I bring them back in.

Any objection, Mr. Lentini?

MR. LENTINI: No objection.

THE COURT: Any objection, Mr. Capitelli?

MR. CAPITELLI: No objection to what the Court is going to state to the jury but I make a special request that the Court specifically state to the jury that there is no obligation under the Law that they reach a verdict.

THE COURT: Your request is denied.

MR. CAPITELLI: Please note my objection.

THE COURT: Please call them back in.

(WHEREUPON JURORS ENTER COURTROOM)

THE COURT: Mr. Conzoneri, did you write this note?

THE FOREMAN: Yes; I did.

THE COURT: I'm going to ask the question again. I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.

The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?

I'll repeat that: Do you feel that any further deliberations will enable you to arrive at a verdict?

Please put your name and yes or no.

(COLLOQUY AT BENCH)

THE COURT: Ladies and Gentlemen, I didn't ask for a polling. DO you all waive a polling?

MR. LENTINI: Yes. State waives the polling.

MR. CAPITELLI: Yes.

THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.

When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.

Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Ladies and Gentlemen please retire to the jury room.

(WHEREUPON JURORS EXIT COURTROOM)

MR. LENTINI: State would request that the last polling which indicated Eleven to One vote, Eleven votes indicating further deliberation would be of benefit in arriving at a verdict and One vote indicating the negative. The State would ask that those sheets be entered into the record.

MR. CAPITELLI: No objection.

THE COURT: Let them be received in evidence.

Counsel, approach the bench please.

(COLLOQUY AT BENCH)

(RECESS)

THE COURT: Please file this into the record.

(RECESS)

THE COURT: Any motion before the jury comes back?

MR. LENTINI: None from the State, Your Honor.

MR. CAPITELLI: None.

THE COURT: Please call them back.

(WHEREUPON JURORS ENTER THE COURT-ROOM)

THE COURT: Counsel, do you waive a polling of the jury?

MR. LENTINI: State waives a polling.

MR. CAPITELLI: Yes, Your Honor.

THE COURT: Ladies and Gentlemen, have you arrived at a verdict?

THE FOREMAN: Yes; we have.

THE COURT: Would you please hand it to the Clerk.

Verdict: Count One, Sheila Thomas. Having found the below listed statutory aggravating circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to death. Aggravated circumstances or circumstances found The Offender knowingly created a risk of death or great bodily harm to more than one person. The victim was a witness in a prosecution against the Defendant and gave material assistance to the state in any investigation of the Defendant.

Gretna, Louisiana the Sixteenth Day of May Nineteen Eighty Four signed Anthony S. Conzoneri, Foreman.

Verdict: Count Three, Carl Osborne. Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to Death. Aggravating circumstance or circumstances found: The Offender knowingly

created a risk of great bodily harm to more than one person.

Gretna, Louisiana the Sixteenth day of May Nineteen Eighty Four, Anthony S. Conzoneri, Foreman.

Count Four, Myrtle Griffin. Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered the jury recommends that the Defendant be sentenced to Death. Aggravating circumstance or circumstances found: The Offender knowingly created a risk of death or great bodily harm to more than one person.

Gretna, Louisiana the Sixteenth day of May Nineteen Eighty Four, Anthony S. Conzoneri, Foreman.

MR. CAPITELLI: Request that the jurors be polled on each of the verdicts, Your Honor.

THE COURT: Yes.

On each sheet of paper if you could please put Count One and Count One is relative to Sheila Thomas. Is this your Verdict? Please write Yes or No. Then sign your name.

Count Three is relative to Carl Osborne. Please put COunt Three at the top of the piece of paper. Ladies and Gentlemen, is this your verdict? Please write Yes or No and then write your name.

Relative to COourt Four, Myrtle Griffin. Ladies and Gentlemen, is this your Verdict? Please write Yes or No and then your name.

I order the Verdict of the jury recorded by the clerk. Counsel, would you approach the bench, please.

(COLLOQUY AT BENCH)

THE COURT: Ladies and Gentlemen, I'd like to thank you very much for your participation in this jury. I was impressed throughout the ten days or so that you served as a juror with your attention, with your patience, with your listening to the testimony and like I said before

you've done everything that the Court has asked you to do and you've done everything I think the Law requires.

So, I thank you very much for serving as a juror. I'll be available for a few minutes after you are discharged in the jury room to talk with you if you'd like. So, and I also have a certificate that I'd like to give to you.

So, I'd ask everyone to wait in the jury room.

I'd like to mention to you as to what you say to people, you can it is totally in your discretion, who you tell what about the case. So, you have a right to talk about the case with people or you don't have to talk to anybody. It is totally up to you. I would just ask you to be very careful what you say and how you say it but thank you very much for serving as jurors.

I discharge you from your jury service

(END OF TRIAL)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-5036

Section "M"

LESLIE LOWENFIELD

versus

C. PAUL PHELPS, *et al.*

Transcript of Evidentiary Hearing in the above-entitled matter, heard on Thursday, February 12, 1987, before the Honorable Peter Beer, District Judge presiding.

ARTHUR J. LENTINI, after having been first duly sworn in the cause, testified on his own oath as follows:

DIRECT EXAMINATION

BY MR. CREDO:

Q What is your occupation?
A I am an attorney.
Q How long have you been an attorney?
A Ten years.
Q Approximately how long have you worked for the District Attorney's Office in Jefferson Parish?
A I worked for the DA's office for nine years, no longer employed there at this time.
Q Approximately how many first degree murder cases have you had occasion to handle?
A I tried five.

Q One of those was Leslie Lowenfield?

A That's correct.

Q Who was your assistant or co-prosecutor in this case?

A Greg Gremillion.

Q Do you have any independent recollection of the pre-trial discovery and pre-trial motions and work that went into the Leslie Lowenfield case?

A Yes.

Q Did you have an opportunity to observe the defense counsel, Wayne Walker and Ralph Capitelli during that stage?

A Yes, I did.

Q During the trial of this matter, were you the prosecutor involved?

A Myself and Mr. Gremillion.

Q Were you present throughout that trial?

A Yes, I was.

Q Did you have an opportunity to observe defense counsel at the point both in the guilty/innocence phase and the sentencing phase?

A Yes.

Q Based on your observations, did you observe any identifiable lapses either physical or mental on the part of either Mr. Walker or Mr. Capitelli during the guilt and innocence or sentencing phase of that case?

A No, I did not.

MR. CREDO: No further questions.

THE COURT: Cross examine, if you wish.

CROSS EXAMINATION

BY MR. ROSS:

Q Prior to the trial did you have any way of observing what it was that Mr. Walker or Mr. Capitelli did in preparing for the case?

A Did I observe what they did? In preparing?

Q Yes.

A To the extent that we conferred on *Brady* material and discovery, things of that nature and what I heard at the hearing, there was testimony that he had interviewed their client at the Correctional Center and to that extent, yes.

Q You don't know, do you, what Mr. Walker and Mr. Capitelli did to prepare for the case, did you?

A Yes, I do. To the extent I know there were several sanity hearings held, upon their request and they came to us several times to ask if we had any other information that would be beneficial to them, along the lines of *Brady*. They came to us and asked to see all the exhibits and evidence and we went through that with them. To that extent, I saw them prepare the case.

Q You didn't have access to their files, did you?

A No.

Q You didn't have access to their investigation reports, did you?

A No.

Q You didn't talk to their investigator, did you?

A No.

Q You didn't know the extent to which they requested records concerning Mr. Lowenfield's past social and cultural history, did you?

A Records outside of what the District Attorney's office had?

Q Yes.

A No.

MR. ROSS: I have no further questions.

THE COURT: I have a few questions since you are here. Do you have an independent recollection of the procedure that you followed in the sentencing phase?

THE WITNESS: Yes. It's been a while as to specifics, I might be a little shaky. I think I do for purposes of this hearing, I think I have an independent recollection of what occurred then.

THE COURT: Would you just tell me what your order of proof was in the sentencing phase, if you recall it?

THE WITNESS: In the sentencing phase, as I recall it, the aggravating circumstances were that the intent to kill more than one person which we proved simply by reintroducing all the exhibits and testimony that was given in the guilt phase. One of the other aggravating circumstances was that one of the victims, Sheila Thomas, was a witness in a prosecution theory being she had made a police report of harassing phone calls against Mr. Lowenfield and in the sentencing phase we introduced a bill of information that was filed by the District Attorney's office which charged Mr. Lowenfield with that crime. We had not introduced that during the guilt phase. In addition, Mr. Lowenfield had a conviction for, I believe it was rape, out of Canada. We did not introduce that in the guilt phase. Mr. Lowenfield took the stand and I cross examined him and I did not ask him about that during the guilt phase. However in the penalty phase we introduced a certified copy of the conviction and I think there was a stipulation from counsel that Mr. Lowenfield was the same person mentioned in the certified copy and that was either an aggravating circumstance, his past criminal record. I don't recall if there were any other aggravating circumstances. I simply reintroduced all of the testimony, exhibits and evidence that had been introduced in the guilt phase and added to that the bill of information charging harassing phone calls and the Canadian conviction.

THE COURT: When you then addressed the jury with respect to the State's position as it had to do with the penalty phase of the trial, can you remember and if you can, would you tell me the order of your argument in terms of the reference back to that evidentiary submission that you made in the course of the penalty phase? In other words, when you argued the penalty that the

State sought, did you make reference to those additional bits of evidence that you just described for me?

THE WITNESS: Did I make reference to those in my argument?

THE COURT: I'm not so concerned about whether you made reference to them specifically but did you make reference to them as being reasons for the State's asking for the death penalty?

THE WITNESS: Well, Your Honor, first of all, I don't believe I asked them to come back with the death penalty. I don't know that in first degree murder cases, I suggested these are the aggravating circumstances that the literature says we must prove in order for them to consider them and I asked them to consider the penalty.

THE COURT: I don't mean to suggest that you did. I just meant in connection with your submission to the jury at the conclusion of the evidence gathering period in the penalty phase. How did you refer to these other things or in fact did you refer to these other things?

THE WITNESS: I'm sure I did. I don't recall specifically but if I followed my normal course in closing argument, I'm sure I did mention those. I don't remember specifically how or what I said.

THE COURT: Would you tell me what your comprehension is of the State's burden at the time that the penalty phase begins?

THE WITNESS: In other words, what the State has to prove in order for the jury to consider the death penalty?

THE COURT: Yes, what is your notion of the order of the State's proof in that respect?

THE WITNESS: That the State has to prove the aggravating circumstances that the Code of Criminal Procedure provides are necessary for the jury to consider, we have to prove that beyond a reasonable doubt.

THE COURT: From what you just told me that is pretty much your statement to the jury after you presented that order of proof to the best of your ability?

THE WITNESS: Yes, Your Honor.

THE COURT: Do you have any other questions based on my questions?

MR. CREDO: No, Your Honor.

THE COURT: Thank you very much. You are excused and I appreciate your coming.

MR. CREDO: I offer a stipulation to counsel that Greg Gremillion, the co-prosecutor, he is available but his testimony would do nothing more than corroborate the points of Mr. Lentini's testimony as far as his actual presence and participation in the trial and I offer a stipulation to counsel that if he testified he would simply say he was prosescutor and he was present during the trial.

MS. MARSHALL: We have no problem with that stipulation.

THE COURT: Let that stipulation be made part of the record.

MR. CREDO: We submit the matter based on that testimony, Your Honor.

THE COURT: Well, we'll meet tomorrow at 9 and proceed from there.

(Whereupon Court was in recess.)

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 86-5036

Section: M (1)

LESLIE LOWENFIELD, Prisoner No. DOC-106178

versus

C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA, *et al.*

[Filed Mar. 31, 1987]

MEMORANDUM DECISION

This matter is before the Court on motion of Petitioner, Leslie Lowenfield, for a writ of habeas corpus and stay of execution, pursuant to 28 USC § 2254. Petitioner claims that he is being detained unlawfully by respondent, Frank Blackburn, in his official capacity as warden of the Louisiana State Penitentiary at Angola, Louisiana. This detention is pursuant to judgment of conviction and sentence of death imposed by the 24th Judicial District Court of Jefferson Parish, Louisiana. Petitioner claims that this conviction and sentence were in violation of rights, privileges, and immunities guaranteed by the Constitution of the United States. For the following reasons, Petitioner's request for relief must be DENIED.

FACTS

The facts are set forth extensively by the Louisiana Supreme Court in *State v. Lowenfield*, 495 So.2d 1245 (La. 1985). They are recounted here as they relate to the issues raised.

Petitioner met Sheila Thomas, the "primary" victim, in July of 1981. At the time, she was working in the sheriff's department in Jefferson Parish, where her principal duty was to escort prisoners from the parish jail to the courthouse and return them back to that facility. In August of 1981 Sheila and her young daughter, victim Shantell Osborne, moved in with Petitioner. The relationship deteriorated into one of acrimony, punctuated by periodic separations. This living arrangement was terminated in June of 1982.

Subsequent to this break up, relations between Petitioner and Sheila Thomas and her family became increasingly bitter. About 5:30 p.m. on 30 August 1982, Sheila Thomas' stepfather, Owen Griffin, was sitting in a vacant lot near his home in Marrero, Louisiana, playing cards with his neighbors, when he heard shots ring out from the Griffin residence. He rushed to the house and ran inside, whereupon more shots rang out.

When the police arrived, they found five bodies sprawled about the living area of the house. Along with Sheila Thomas and her four year old daughter, Shantell, were the bodies of Carl Osborne, the father of Shantell, Owen Griffin, and his wife, Myrtle Griffin. All had sustained multiple gunshot wounds. Each had been shot in the head at close range.

A jury convicted Petitioner of three counts of first degree murder and two counts of manslaughter. Following the presentation of evidence during the sentencing phase of the trial, the jury unanimously recommended the death sentence. On 29 May 1984 Petitioner was sentenced to death on each count of first degree murder. The Louisiana Supreme Court affirmed the jury's

findings and the sentence on 2 December 1985. The trial court signed Petitioner's death warrant on 3 September 1986, setting his execution for 19 November 1986. In the trial court proceedings, Petitioner filed a petition for post-conviction relief, habeas corpus, evidentiary hearing and stay of execution on 12 November 1986. The trial court denied Petitioner's petition on 14 November 1986. Petitioner filed the instant motion with this court on 17 November 1986, two days before the date of execution. He asserted sixteen claims for relief. This court stayed Petitioner's execution on 18 November 1986.

Following a conference with counsel for Petitioner and the State, this court granted Petitioner's request for an evidentiary hearing, setting it for 12 February 1987. At the evidentiary hearing, which included testimony from Petitioner at Angola, Petitioner was permitted to introduce evidence and testimony to support the contentions hereafter discussed.

CLAIM 1 Instruction of the Jury

In his first claim for relief, Petitioner asserts that the aggravating circumstance that formed the basis for the death sentence, as applied in this case, violates the eighth and fourteenth amendments because the jury was improperly instructed.

Petitioner was sentenced to death by the jury on the basis of its finding two statutory aggravating circumstances: La. Code Crim. Proc. Ann. arts. 905.4(d) and 905.4(h). The Louisiana Supreme Court found that the evidence adduced at trial was insufficient to support the aggravating circumstance set forth in article 905.4(h). Thus, the aggravating circumstances upon which Petitioner's sentence stands is set forth in article 905.4(d): that Petitioner "knowingly created a risk of death or great bodily harm to more than one person.

At the sentencing phase of Petitioner's trial, the court instructed the jury that in order to find the existence of

the aggravating circumstance set forth in La. Code Crim. Proc. Ann. art. 905.4(d), it was required to find that Petitioner knowingly created a risk of death or great bodily harm to more than one person. Petitioner claims that the court was obligated to instruct the jury that it had to find that Petitioner "acted with *specific intent* to kill more than one person and actually caused the death of one person and the risk of death or great bodily harm to at least one person, *all by a single act or by a series of acts in a single consecutive course of conduct.*" Petitioner's brief, at 20 (emphasis in original). For support of this assertion Petitioner cites *State v. Williams*, 480 So.2d 721, 726 (La. 1985). Because the jury was not instructed in accordance with the holding in *Williams*, Petitioner argues, the aggravating circumstances upon which he was sentenced could not provide the discretion-guiding function required by the United States Supreme Court. *See, e.g., Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

In *Williams*, decided subsequent to Petitioner's conviction and sentencing, the issue was whether the evidence was sufficient to prove both that (1) defendant acted with a "specific intent to kill . . . more than one person" (one of the aggravating elements in La. Rev. Stat. Ann. § 14:30's definition of first degree murder that must be proved in the guilt phase), and (2) that defendant "knowingly created a risk of death . . . to more than one person" (the aggravating circumstance of article 905.4 (d) that must be proved in the penalty phase). The *Williams* court held that the two statutes should be construed similarly, even though one defines the crime and the other involves the standards for jury discretion in sentencing. Regarding article 905.4(d), the *Williams* court observed that

> the Legislature intended to classify among the most serious murders those in which the murderer specifically intended to kill more than one person and

> actually caused the death of one person and the risk of death or great bodily harm to at least one other person, all by a single act or by a series of acts in a single consecutive course of conduct.

Williams, at 726.

The *Williams* court, however, did not deal with jury instructions. Its objective was to determine whether the evidence supported the jury's affirmative finding of an aggravating circumstance in both the guilt and penalty phases. In a factual setting less compelling than the instant one, the *Williams* court found that the evidence supported the jury's findings. The Louisiana Supreme Court had the same opportunity in the instant case and likewise determined that the evidence adduced at trial supports the jury's findings. This court finds no constitutional defect in that court's conducting of its appellate review.

CLAIM 2 Duplication of the Elements of the Underlying Crime in the Aggravating Circumstances

In his second claim for relief Petitioner asserts that the aggravating circumstance upon which the death sentence is based merely duplicates the elements of capital, or first degree, murder under Louisiana law. As such, Petitioner argues, the statutory aggravating circumstance in this case does not provide a rational basis for the imposition of the death penalty.

Petitioner was convicted of three counts of first degree murder and two counts of manslaughter. Under La. Rev. Stat. Ann. § 14:30 A.(3), first degree murder is the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The elements required to prove the existence of the sole aggravating circumstance upon which Petitioner's death sentence is based, La. Code

Crim. Proc. Ann. art. 905.4(d), are, indeed, duplicative of the elements needed to prove the underlying crime of first degree murder. Petitioner argues that this violates constitutional requirements as set forth by the United States Supreme Court.

In 1972 the United States Supreme Court struck down as violative of the eighth and fourteenth amendments death sentences imposed under statutes that left juries with "untrammeled discretion" to impose or withhold the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). Four years later, in *Gregg v. Georgia*, 428 U.S. 153, *reh'g denied* 429 U.S. 875 (1976), the Court ruled that Georgia's death penalty statute was constitutional. *Furman* and *Gregg* thus form the datum from which this Court's analysis must proceed.

After summarizing its former problems with affording juries untrammeled discretion, the *Gregg* court set forth a general exposition of sentencing procedures that would satisfy the concerns of *Furman*. Specifically, Georgia's statute set up a bifurcated process whereby after the jury first found that the defendant was guilty of murder, it would then pass upon the sentence to be imposed in a separate process. Georgia narrowed the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which must be found to exist after the guilt phase to impose a death sentence. Georgia defined murder as when a person "unlawfully and, with malice aforethought, . . . causes the death of another human being. . . ." Ga. Code Ann. § 26-1101 (1978). Thus, Georgia's statutory aggravating circumstances narrowed the class of persons eligible for the death penalty and reasonably justified the imposition of a more severe sentence on some people than on others convicted of the same underlying crime. The unifying theme of all Supreme Court death penalty review is that to be valid, a state's death penalty must provide a reasonable distinction between those convicted

murderers who warrant death and those convicted murderers who do not. What is important at the selection stage, the Court has reiterated often, "is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862 (1983) (emphasis in the original); *See also Godfrey v. Georgia*, 446 U.S. 420 (1980).

Louisiana has a bifurcated process. Modeled after Georgia's statute, Louisiana's death scheme is different in that the *definition* of murder includes, or duplicates, the aggravating circumstances that are later used to distinguish between those convicted murderers who are to die and those who are to live. In 1979 the Louisiana Legislature amended La. Rev. Stat. Ann. § 14:30 to add the requirement of an "aggravating circumstance" as an essential element of first degree, or capital, murder. Thus, the State Legislature incorporated the discretion-channeling function of aggravating circumstances into the *definition* of first degree murder, thereby requiring the finding of an aggravating element in the guilt phase of the trial, before the offender could even be subject to a penalty hearing. It is this aspect of Louisiana's death penalty statute that Petitioner attacks as violative of the mandate of *Furman*, *Gregg*, and cases that follow.

The Louisiana Supreme Court has held repeatedly that this statute is constitutionally valid. *See, e.g., State v. Loyd*, 489 So.2d 898 (La. 1986); *State v. Knighten*, 436 So.2d 1141 (La. 1983); *State v. Clark*, 387 So.2d 1124 (La. 1980). *See also Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986); *Gray v. Lucas*, 677 F.2d 1086, 1104 (5th Cir. 1982). Petitioner, however, cites to *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 546 (1985) for support. In *Collins*, petitioner Carl Collins was convicted in Arkansas for felony murder, specifically charged in the bill of information as murder in the course of a robbery. In Arkansas at that time not all murder was capital murder, however. To obtain a capital murder conviction,

the state needed to show the existence of at least one of six statutorily defined aggravating circumstances, one of which was felony murder. As in Louisiana, a finding of felony murder was not itself sufficient to warrant the death penalty. The jury had also to find at least one statutory aggravating circumstance, which, in Collins' case, was that the murder was committed for pecuniary gain.

The Eighth Circuit noted first that the aggravating circumstance used to sentence Collins was the same element that the state used to convict defendant of capital murder in the first place. "Thus, once Collins had been convicted for capital felony murder . . ., the jury had necessarily found one aggravating circumstance." *Collins*, at 263. Drawing from *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Zant v. Stephens*, 462 U.S. 862 (1983), and *Furman v. Georgia*, 408 U.S. 238 (1972), the *Collins* court stated that "an aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime." *Collins*, at 264. The Eighth Circuit concluded that there is "no escape from the conclusion that an aggravating circumstance which merely repeats an element of the underlying crime cannot perform this narrowing function [required by *Furman*, *Gregg*, *Godfrey*, and *Zant*]." *Id.* Thus, argues Petitioner, in Louisiana, if no aggravating or mitigating circumstances are found in the sentencing phase, other than those already found in the guilt phase, the jury is left to decide whether to impose death on a murderer, who also acted with a specific intent to kill or inflict great bodily harm upon more than one person, without having made any finding that narrows the class of those who have committed the same death-eligible crime. *See also Wiley v. Mississippi*, —— U.S. ——, 107 S. Ct. 304, 305 (1986) (Marshall, Brennan, JJ., dissenting) ("[T]he use of aggravating circumstances which

repeat an element of the underlying capital offense creates a substantial risk that death will be inflicted in an arbitrary and capricious manner.").

The United States Supreme Court has interpreted the eighth and fourteenth amendments as requiring the states to provide statutory aggravating circumstances as discretion-guiding aids to juries. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). The rationale underlying this is that such aggravating circumstances provide a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). The Supreme Court has not held, and this court does not interpret the U.S. Constitution to require, that the aggravating circumstance(s) used to sentence a defendant must be different from the element(s) of the underlying crime.

The *Collins* argument is flawed in practice. This argument requires the state to introduce something "extra" at the sentencing phase: "an aggravating circumstance to narrow the class of death-eligible criminals. To allow the state to merely reintroduce at the sentencing phase that which was determined at the guilt phase, this argument suggests, is to make the sentencing phase but a sham. However, the reality of the situation is that the jury has, necessarily, already found the existence of the aggravating circumstance(s) by the time of the sentencing phase. Moreover, the *Collins* approach uses the sentencing phase to narrow the class of death-eligible offenders; Louisiana narrows the class at the definitional stage. The death-eligible class of murderers, having been narrowed from the larger pool of murderers, then goes before the jury for its decision in both systems. What is important at this stage is that the jury, with all the information available, has the same latitude of discretion that is constitutionally mandated. In actuality, the end result is identical in either system although slightly different—albeit equally valid—routes are used in arriving there.

CLAIM 3 The Death Penalty as Discriminatorily Applied

Petitioner argues that Louisiana's death penalty, as applied, discriminates against black defendants in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution. Petitioner, a black person, contends that Louisiana's capital punishment statute is discriminatorily applied on the basis of both the race of the defendant and the race of the victim. Therefore, claims Petitioner, his petition presents the identical issue on which the U.S. Supreme Court granted certiorari in *McCleskey v. Kemp, cert. granted,* —— U.S. ——, 106 S. Ct. 3331 (7 July 1986) and *Hitchcock v. Wainwright, cert. granted,* —— U.S. ——, 106 S.Ct. 2888 (9 June 1986).

This court granted Petitioner's request for an evidentiary hearing. The hearing was held on 12 February 1987 at which time Petitioner introduced testimony from Dr. Mervyn D. Smith, a Ph.D. in sociology. Dr. Smith had considerable expertise in the area of racial discrimination in the area of sentencing. However, having heard Petitioner's evidence on this claim, the court is obliged to conclude that the argument is without merit.

Petitioner further argues that because this case is similar to two cases presently before the Supreme Court, it should be stayed pending the Court's resolution of the issues. Petitioner did not, in any meaningful way, establish at the evidentiary hearing or otherwise that the instant case is controlled by the same issues that are present before the Supreme Court in *McCleskey* and *Hitchcock*. Petitioner did not produce evidence that even remotely established specific acts evidencing intentional or purposeful discrimination against him on the basis of race. *Berry v. Phelps*, 795 F.2d 504 (5th Cir. 1986); *Prejean v. Maggio*, 765 F.2d 482, 484 (5th Cir. 1984); *Spinpellink v. Wainwright*, 578 F.2d 582, 614 (5th Cir. 1978). Stated succinctly, Petitioner failed to satisfy his burden of proof that he was discriminated against. Fi-

nally, this court is obliged to deal with cases and controversies according to existing jurisprudence; until that jurisprudence changes, this Court must be unaffected by the fact that it may, some day, change.

CLAIM 4 The Introduction At Trial of Arbitrary Factors

In this claim, Petitioner argues that arbitrary factors were introduced at the sentencing phase of his trial in violation of his right to due process under the fourteenth amendment. Petitioner cites four arbitrary factors.

First was the admission of a bill of information charging Petitioner with making harassing phone calls to the primary victim, Sheila Thomas, before her death. This bill was introduced to support the State's assertion of La. Code Crim. Proc. Ann. art. 905.4(h) ("the victim was a witness in a prosecution against the defendant") as an additional aggravating circumstance. The Louisiana Supreme Court held that the evidence was insufficient to prove that Petitioner killed Ms. Thomas to keep her from testifying against him, because Petitioner was only charged with this crime after the murders had occurred. Although the Louisiana Supreme Court ruled that the evidence was insufficient, it found that "given the overwhelming enormity of defendant's crime, it is inconceivable that the additional evidence that the defendant was charged with could have prejudiced defendant." *State v. Lowenfield*, 495 So.2d 1245, 1258 (La. 1985). Petitioner takes issue with this. He argues that, far from being inconceivable, it was substantially likely that this flawed evidence could have tipped the balance in the minds of one or more jurors in favor of the death penalty, especially in light of the circumstantial posture of the case.

The federal judiciary's resistence to challenges in federal court of state court evidentiary matters by habeas corpus is firmly established. *See, e.g., Bryson v. State of*

Alabama, 634 F.2d 862, 864 (5th Cir. 1981). A violation of state evidentiary rules will not, in and of itself, invoke section 2254 habeas corpus relief. *Id.* The violation must be of such a magnitude that it constitutes a denial of fundamental fairness. *Meyer v. Estelle*, 621 F.2d 769, 771 (5th Cir. 1980); *Cronin v. Alabama*, 587 F.2d 246, 250 (5th Cir. 1979). The erroneous admission of prejudicial evidence can justify habeas corpus relief only if the error was "material in the sense of a crucial, critical, highly significant factor." *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir. 1976). In the instant case Petitioner was convicted of murdering five people, including a four year old girl. Each victim had been shot in the head at close range. The introduction of evidence pertaining to a petitioner's making harassing telephone calls does not rise to the level of a denial of fundamental fairness.

Petitioner's second claim is that the jury was improperly charged, as set forth more fully in Claim 1. This claim has, therefore, been dealt with in detail, *supra*.

Petitioner's third claim is that the trial court allowed evidence of a prior criminal conviction in a foreign court without first requiring proof of the reliability and fairness of the foreign proceeding. Specifically, Petitioner was convicted of attempted rape and a weapons charge in Canada.

In *Lewis v. United States*, 445 U.S. 55 (1980), the Court recognized that under the sixth amendment an uncounseled felony conviction cannot be used for certain purposes. However, the Court noted this does not mean that such a conviction cannot be used for other purposes. *Lewis* dealt with the State's use of an uncounseled felony conviction for the purpose of imposing a "civil firearms liability, enforceable by a criminal sanction." 445 U.S. at 67. The Court distinguished *Lewis* from past cases in which the use of an uncounseled felony conviction was held invalid. In those cases, the Court stated, the subsequent conviction or sentence violated the sixth amend-

ment because it depended upon the reliability of the past uncounseled conviction. However, the Court observed, federal gun laws focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Thus, the Court held, "enforcement of that essentially civil disability though a criminal sanction does not 'support guilt or enhance punishment.'" *Id.*

In *State v. Mattheson*, 407 So.2d 1150, 1164 (La. 1982), the defendant objected to the introduction at the sentencing phase of prior convictions without a showing that he had been represented by counsel. Citing *Lewis*, the *Mattheson* court stated that the convictions "were not used to enhance punishment; rather, defendant's past criminal history was merely a part of the total picture of his 'character and propensities.'" *Id.* On appeal of the denial of Mattheson's habeas petition, the Fifth Circuit noted that it is clear that a habeas petitioner has the burden of proving that the convictions used by the state were constitutionally defective. *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983). *See also Webster v. Estelle*, 505 F.2d 926, 928-29 (5th Cir. 1974), *cert. denied*, 421 U.S. 918 (1975).

In the instant case, there is nothing in the record to show that Petitioner's prior criminal record was introduced for any reason other than to illustrate a part of the total picture of his character and propensities. Petitioner has the burden of showing at least some constitutional deficiency in the prior convictions introduced at the sentencing phase. This he has not done.

In his fourth claim, Petitioner assets that the trial judge coerced a seemingly deadlocked jury into sentencing Mr. Lowenfield to death.

The jury was charged in the afternoon of 15 May 1984. It deliberated over three hours that night. The next day the jury deliberated for another two hours when defense counsel moved for a mistrial. Several hours later defense counsel re-urged his motion. The jury was

brought back into the courtroom when it indicated that it was deadlocked. The court again charged the jury, telling them that if they were unable to reach a verdict, the court would sentence petitioner to life imprisonment. In response to the court's poll, four jurors indicated that further deliberations would not be helpful. The trial judge conferred with counsel, brought the jury back into court, and asked them: "Do you feel that any further deliberations will enable you to arrive at a verdict?" The result of the second polling was that one juror was of the view that further deliberations would not be helpful. The court sent them back to deliberate. Thirty minutes later the jury came back with its verdict. Petitioner claims that by ordering the jury to continue its deliberations despite a "clear indication that the jury was hopelessly hung, the court in effect coerced the jury to quash any dissent and to return a verdict of death." Pet. Br., at 43.

In Louisiana it is the trial judge who determines when a jury is deadlocked. *State v. Monroe*, 397 So.2d 1258, 1272 (La. 1981). His decision is not to be overturned except upon a showing of "palpable abuse of discretion." *State v. Governor*, 331 So.2d 443, 451 (La. 1976). Unlike the trial judge in *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), which Petitioner cites for support, the judge in Petitioner's case did not invade the secrecy of the jury or identify a deadlocked jury's majority-minority count. Considered in light of the totality of the circumstances, the trial judge's decision to return the jury for further deliberations did not constitute a violation of Petitioner's constitutional rights.

CLAIM 5 Change of Venue

Petitioner argues that the trial court erred in not granting his motion for a change in venue. Petitioner claims that a change of venue should have been granted because of the "close working relationship" between the

judges involved in the case and the primary victim, Sheila Thomas. Moreover, Petitioner claims that the trial court conducted a voir dire on Petitioner's motion for a change of venue that was inadequate to determine the actual prejudice resulting from the pretrial publicity. According to Petitioner, the court should have presumed actual prejudice from the pretrial publicity.

Petitioner first claims that the judges were unable to adequately distance themselves from Sheila Thomas and her family. Judge Collins testified at this court's evidentiary hearing that he had had contact with the Thomas family going back many years. He recused himself, and the case was re-alloted to Judge Cannella. Petitioner then claims that because Judges Collins and Cannella are part of the same judicial "team", and because Judge Cannella also knew Sheila Thomas, Judge Cannella could not impartially try Petitioner's case. At the evidentiary hearing Judge Cannella testified about the use and make up of the judicial teams; that they are, primarily, loose organizational structures designed to ensure that at least one judge will always be available at the courthouse. Judge Cannella testified that he has no more contact with members of his judicial team than with other, non-member, judges, and that he would be no more likely to confer with members than non-members concerning any given case or issue. More to the point, Judge Cannella testified that he did not know Sheila Thomas or her family, and became aware that she had, apparently, escorted prisoners to his courtroom only after the trial proceedings in this case had begun. Lastly, both Judges Cannella and Collins testified that they had, in fact, *not* discussed the Lowenfield case at all. I find their testimony credible in all respects.

Petitioner claims that extensive pre-trial publicity permeated the local community to such an extent that he could not receive a fair trial. The trial court conducted two hearings on Petitioner's motions for a change in venue. The first hearing was held in April, 1983, eight

months after the murders and over a year prior to trial. At this hearing Judge Collins heard twenty prospective jurors questioned about their knowledge of the publicity. Of the twenty, one was disqualified for a hearing impairment, three had heard reports of the case and had formed opinions, three had neither heard nor read of the case, one knew Petitioner, and the remainder of the people had heard of the deaths but had not formed an opinion. After hearing the testimony Judge Collins denied the motion. The second hearing was held in May, 1984, just prior to the trial. Twenty-nine people were called and asked whether they had heard of the case. Ten responded affirmatively and the rest stated that they hadn't heard of the case. Of the ten, only two said they couldn't determine what effect the publicity would have on them, and only one had formed an opinion. Judge Cannella denied the motion.

Four of the jurors and alternate jurors actually selected to hear the case had heard about the series of events prior to trial. One of the accepted jurors stated that he questioned his ability to sit through the trial and be fair and unbiased. Another stated that he had a problem with the presumption of innocence, while another stated that she couldn't be sure that she could fairly serve on the jury if Petitioner failed to take the stand. Petitioner claims that the court's determination that an impartial jury could be chosen was highly questionable and, in fact, the jury actually chosen was not impartial and had been unduly prejudiced by pre-trial publicity.

Petitioner relies upon *Irvin v. Dowd*, 81 S. Ct. 1639 (1961) for the proposition that habeas relief is mandated where the trial court failed to give the defendant a full and fair opportunity to prove prejudice from pretrial publicity. The Court in *Dowd* pointed out that

> it is not required that jurors be totally ignorant of the facts and issues involved . . . . [A]n important case can be expected to arouse the interest of the

> public in the vicinity, and scarely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id., at 1642-43. The Court went on to say that the test is whether the nature and strength of that opinion suffice to rebut the presumption of a juror's impartiality as a matter of law. The question thus presented is one of mixed law and fact. The *Dowd* Court held that "the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside." *Id.*

Petitioner claims that the trial court at both hearings relied erroneously upon the statements made by the jurors themselves about their individual competence to impartially hear the case. He argues that the court should have made a more detailed and individualized questioning of the veniremen. Petitioner cites to *United States v. Davis*, 583 F.2d 190 (5th Cir. 1980) for support. In *Davis*, a case that attracted national coverage, every jury panel member had heard about the case. The trial judge asked whether any panel member felt that the publicity impaired his ability to render an impartial decision. No juror responded. The court denied defendant's request for individualized voir dire. The Fifth Circuit Court of Appeals held that "[t]he district court erred in not undertaking a more thorough examination of those panel members exposed to publicity." *Id.* The *Davis* court recognized that where pre-trial publicity is a fac-

tor, a juror's conclusory statement of impartiality is insufficient. Instead, the trial court, and not the juror, must determine, from questioning, whether the juror can lay aside any impression or opinion due to the exposure. However, this court has before it a habeas corpus review; a review of state proceedings. *Davis* dealt with appellate review of a federal district court criminal trial. The Fifth Circuit reversed the district court in *Davis* "in the exercise of its supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts, and not as a matter of constitutional compulsion." *Murhpy v. Florida*, 421 U.S. 795, 797 (1975) (citing *Marshall v. United States*, 360 U.S. 310, 313 (1959)). Further, in this case the lawyers for both sides interviewed each prospective juror individually and often at great length. The voir dire transcripts occupy several hundred pages. Even if the judge were to have asked questions of each potential juror, there would have been little he could have asked that the attorneys did not. Petitioner has failed to show that there was such pre-trial prejudice to warrant a change in venue.

Regarding the imperfections of the jurors actually chosen, this court read those applicable portions of the transcripts. Four of the jurors had heard about the case on the news. As discussed above, this, alone, means little, and Petitioner takes it no further. One of the jurors questioned his ability to sit through the whole trial and be fair-minded. However, this statement was made in the context of concern for his wife and new baby; he was worried about leaving them alone. His concern did not relate to this case as such, and once his concerns over his family were addressed, he agreed that he held no preconceptions. He was not challenged. However, one juror, Catherine Roberts, expressed an inability to not consider Petitioner's not taking the stand:

> MS. ROBERTS: . . . I know right now the idea of his not being up there, I know if I'm thinking now I'm sure it might happen.

> MR. CAPITELLI: . . . I need to know the answer now. I'm not going to get a chance to do it later. If it is causing you concern now, I need to ask you to articulate it in terms of would that effect in your mind concern you to the point you could not be totally fair?
>
> MS. ROBERTS. Yes.

Transcript, 9 May 1984, at 168. Ms. Roberts was asked a few more unrelated questions. She was not challenged. Petitioner apparently felt that she was a good juror for his cause. It may have been the way she looked, her religious affiliation (Luteran (sic)), or something else. In any event, Petitioner was satisfied with her. Further, Petitioner *did* take the stand, so Ms. Roberts's reservations were mooted.

Petitioner contends that the trial court should have *presumed* prejudice to Petitioner based upon the pre-trial publicity. He claims that the pre-trial publicity in this case so pervaded and saturated the community that a fair trial was impossible. In support of the contention that, in this instance, the court should have presumed prejudice, Petitioner cites: *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980); *Shepard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965). Each of those cases is distinguishable. Prejudice was presumed in the circumstances under which the trials in *Rideau*, *Estes*, and *Shepard* were held. In those cases the influence of the news media, either in the community at large or in the courtroom itself, pervaded the proceedings. In *Rideau* the defendant "confessed" under police interrogation to the murder for which he was later convicted. A twenty minute film of this confession was broadcast three times by a television station in the community where the crime and trial took place. In reversing, the Court did not examine the jury voir dire for evidence of actual prejudice because it considered the trial "but a

hollow formality," the real trial having occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras.

In *Mayola*, the defendant, accused of the rape-murder of a young boy, turned himself in to authorities in a foreign state. A reporter from the town in which the trial was to take place finagled his way into the car that was used to transport the defendant. News reports of what the defendant was saying appeared as headline news each day. These stories were inculpatory and played upon the emotions of the population of a small town. Nevertheless, although these stories seemed prejudicial and, in some instances, erroneous, the court held that defendant did not meet his burden of showing the requisite pervasiveness of prejudice to warrant the court's presumption of prejudice. The trials in *Estes* and *Shepard* were overturned and prejudice presumed because the proceedings were not only infected by a background of inflammatory publicity but also by a courthouse given over to accomodate the public appetite for carnival. In the instant case Petitioner has shown neither the requisite degree or pervasiveness of prejudicial publicity nor the requisite lack of decorum in the proceedings to warrant a presumption of prejudice.

CLAIM 6

Petitioner combines various issues in support of granting his writ of habeas corpus. To clarify the arguments raised within Claim 6, the Court will review the legal issues point by point, as addressed in the original petition.

A. The Constitutionality of La. Rev. Stat. Ann. § 15:432

Petitioner first asserts that La. Rev. Stat. Ann. § 15:432 violates the due process clause of the fourteenth amendment in that the statute impermissibly shifted the burden

to the Petitioner to prove his competency to stand trial. Pet. Brief at 74. Petitioner avers that once the competency of a defendant is at issue, the burden should fall upon the prosecution to prove the defendant's fitness for trial. *See, United States ex rel. v. Franzen*, 686 F.2d 1238, 1244-45 (7th Cir. 1982); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976); *but see Mulianey v. Wilbur*, 421 U.S. 684 (1975) (Rehnquist, J., concurring); *Leland v. Oregon*, 343 U.S. 790 (1952). In *Franzen*, the Seventh Circuit Court of Appeals ruled that there was "little question that the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised." 686 F.2d at 1244. This reasoning echoed sentiments expressed in a more limited context by the Fifth Circuit in *Makris*.

The reasoned pronouncements of the Fifth and Seventh Circuits with regard to the burden of proving a defendant's fitness to stand trial are unavailing to Petitioner, who voluntarily withdrew his insanity plea and opted for an alibi defense. Petitioner was accorded three sanity hearings. The conclusion reached by all three commissions was that Petitioner was sane. Following the third sanity hearing, Petitioner took the stand of his own volition and voluntarily withdrew his insanity defense, testifying:

> . . . I plead not guilty and my reason for pleading not guilty because I wasn't in the State of Louisiana in August—August 30, 1982 the day I was accused of a crime.
>
> . . . I wished not to plead guilty by reason of insanity because reason of insanity is telling the court that this person did something he wasn't responsible for something. And to the best of my knowledge I never had no mental illness in my whole entire life and up to this moment I do not have any mental

> problems. And I advised him to withdraw the plea because it's telling, your're telling the court plainly to plead reasonable insanity. You're looking for a way out . . . . (Trial Trans. Vol. III, at 851-852).

Petitioner voluntarily determined to pursue an alibi defense. At that point, he put to rest the question of his fitness to stand trial.[1] The withdrawal of the insanity defense essentially mooted the issue of whether the three previous sanity hearings passed constitutional muster.

Petitioner's reliance on *Sandstrom v. Montana*, 442 U.S. 510 (1979) is misplaced. In *Sandstrom*, the Supreme Court reversed a criminal conviction when the trial court improperly instructed the jury by not requiring the state to prove every element of the *substantive crime* beyond a reasonable doubt. In contrast, the jury in the instant case found that the State proved every element of the substantive crime beyond a reasonable doubt. The rule of *Sandstrom* simply compels the state to prove guilt beyond a reasonable doubt concerning all the elements of the substantive crime. Moreover, as already noted, the issue is mooted by the Petitioner's withdrawal of his insanity plea for the reasons stated above.

B. The Right to be Provided with Psychiatric Assistance to Prepare a Defense Under the Sixth and Fourteenth Amendments

In this portion of his sixth claim, Petitioner contends that he was "never assigned a psychiatrist to assist him in preparing" for his defense at the original trial or at any of his subsequent appeals. Pet. Br. at 75. Petitioner contends that the denial of psychiatric assistance was in violation of the Supreme Court's holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985).

In *Ake*, an indigent defendant had received extensive pre-trial psychiatric evaluation. When the defendant's

---

[1] It is clear that Petitioner refused to allow his counsel to present an insanity defense. Evid. Hear. at 102.

condition rehabilitated to the point where criminal proceedings could continue, the defendant's attorney informed the Court that the defendant would raise the insanity defense. Defense counsel then requested that the State provide a psychiatrist to examine the defendant concerning his "mental condition at the time of the offense." 105 S. Ct. at 1091. The trial court refused the request. On review, the Supreme Court reversed the trial court's denial of psychiatric assistance and stated:

> [W]hen a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id. at 1097.

Any valid claims that the present Petitioner may have invoked under the *Ake* decision became moot when the Petitioner voluntarily withdrew his insanity defense. Here Petitioner "demonstrated to the trial judge" his desire to proceed with an alibi defense and not an insanity defense. Thus, the "significant factor at trial" was whether the Petitioner was in Louisiana on the day of the crime and not whether he needed psychiatric assistance for a defense that he chose not to pursue.

C. *The Trial Court's Compliance with the United States Supreme Court's Pronouncement in Pate v. Robinson*

Petitioner next avers that following his third sanity hearing on May 7, 1984, various events took place that should have prompted the trial court to order further psychiatric testing and competency proceedings of the Petitioner. The purported events included, *inter alia*, Petitioner's request that his counsel withdraw his insanity plea, his instructions to counsel not to present an

insanity defense, and counsel's motion to withdraw from representing Petitioner. *See generally*, Pet. Br. at 76-79. These and other factors now lead Petitioner to assert rights pursuant to the decision in *Pate v. Robinson*, 383 U.S. 375 (1966).

Pate is another case in a line of decisions in which the Supreme Court has attempted to outline the rights owed under the Federal Constitution to a criminal defendant whose sanity or general competency to stand trial is questioned. In *Pate*, the Court held that the defendant had not waived the issue of whether he was competent to stand trial due to his possible insanity. *Id.* at 384. Under those circumstances, the Supreme Court ruled that the Petitioner's "constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial . . ." *Id.* at 386.

In the case at bar, Petitioner was accorded three sanity hearings that delved into whether he was fit to stand trial. All three of the commissions answered in the affirmative. The trial court fulfilled the mandate of *Pate*. Furthermore, Petitioner had no standing with respect to the *Pate* decision. The trial court had no obligation to order, *sua sponte*, a fourth sanity hearing simply because, following the third such hearing, Petitioner voluntarily waived his insanity defense and adopted an alibi defense.

D. The Denial of Counsel's Motion to Withdraw and Petitioner's Motion to Replace His Counsel.

Petitoner's final contentions under Claim 6 concern his representation at trial. Invoking *Strickland v. Washington*, 466 U.S. 668 (1984) and cases following, he claims that the trial court erred in denying both his attorneys' motion to withdraw from the case and Petitioner's motion to substitute counsel.

In *Strickland*, the Supreme Court established two basic requirements for finding that a defendant has suffered ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

104 S. Ct. at 2064.

To support the claim that his counsel was ineffective, Petitioner cites to various activities that may suggest discord between him and his attorneys. A vast majority, if not all, of the purported events relate to alleged disagreements in strategy and potential conflicts between client and counsel. *See, e.g.*, Pet. Br. at 80-84. In reviewing a similar claim in Petitioner's state court proceedings, the Louisiana Supreme Court properly noted that in *United States v. Cronic*, —— U.S. ——, 104 S. Ct. 2039 (1984), the determination of whether an attorney rendered effective assistance of counsel must concentrate "on the advesarial process, not on the accused's relationship with his lawyer as such." 104 S. Ct. 2046 at n.21. Despite potential pre-trial disagreements between Petitioner and counsel, the record does not suggest that the adversarial "process los[t] its character as a confrontation between adversaries" that signals the breech of the "constitutional guarantee." 104 S. Ct. at 2045, 2046. Petitioner was accorded effective assistance of counsel in accordance with his sixth amendment rights.

Petitioner next points to the decision *Wilson v. Mintzes*, 761 F.2d 275 (6th Cir. 1985) and asserts that the state court should have granted his motion to substitute counsel. Petitioner maintains that the presence of threatening letters and the disagreements between him and his counsel relating to the proper avenue of defense support his claim that his motion to substitute counsel should have been granted. Pet. Br. at 81-84. The facts and circumstances present here indicate that the trial court

properly denied the motion to substitute counsel. Every criminal case has the potential for disagreement between the accused and counsel about strategies. What is pertinent to this case is that the court's denial of the motion was correct. Mr. Walker had been representing Petitioner since early 1983. *See* Trial Trans. Vol. I, at 47. The motion to substitute was heard on March 14, 1984. Trial Trans. Vol. III, at 597-599. By then, Mr. Walker was intimately involved with the case. Moreover, the true basis of Petitioner's fear (which led to the motion to substitute counsel) was unfounded—as discussed by the Louisiana Court of Appeals in *State v. Lowenfield*, 450 So.2d 675, 676 (La. App. 5th Cir. 1984). Although the pre-trial period did not proceed in complete harmony, there has been no showing that the trial court's denial of the motion to substitute counsel or counsel's motion to withdraw was "unreasonable and arbitrary." *Mintzes*, 761 F.2d 287.

Petitoner's sixth claim is without merit.[2]

Claim 7 The Adequacy of the State Record

In his seventh claim, Petitoner contends that the record is inadequate to determine whether the death sen-

---

[2] Intertwined in Claim 6 of the petition, the Petitioner contends that "The Louisiana Courts . . . improperly determined that Mr. Lowenfield was competent to stand trial . . ." Pet. Br. at 67. Unlike the other assertions raised under Claim 6, Petitioner fails to specifically elucidate the error of the Louisiana courts as he has done in arguments A through D. However, whether by impliedly attacking the Louisiana courts' findings as to his competency via individual arguments A through D, or, taken as a whole, all the facts and arguments raised in Claim 6, the Court finds Petitioner's assertion, that the Louisiana courts improperly found him competent to stand trial, is without merit. Petitioner was accorded three sanity hearings. He was found competent by all three commissions. For further elucidation on Petitioner's fitness to stand trial, see the discussion in *State v. Lowenfield*, 495 So.2d 1245, 1252 (La. 1985). Moreover, Petitioner made the sanity and/or competency issue moot by withdrawing his insanity defense and opting for an alibi defense. Petitioner was competent to stand trial.

tence was arbitrarily imposed. Petitioner first claims that the transcript did not contain an adequate record of the voir dire proceedings. Therefore, it is contended that the record is inadequate for review on the issue of whether peremptory challenges were used to remove potential jurors on account of their race, in violation of *Batson v. Kentucky*, —— U.S. ——, 106 S. Ct. 1712 (1986). In a similar vein, Petitioner avers that the record does not indicate whether potential jurors were excluded due to their opposition to capital punishment. *See Witherspoon v. Illinois*, 391 U.S. 510 (1968); Pet. Br. at 85.

Petitioner cannot, on the showing made, contest the adequacy of this nine volume record, especially when there was no contemporaneous objection to the alleged error(s). *See* La. Code Crim. Proc. Ann. art. 841; *Engle v. Issac*, 456 U.S. 107 (1982). In *Batson*, defense counsel made a motion objecting to the use of the challenges. 106 S. Ct. at 1715. Similarly, in *Witherspoon*, the pertinent statements of the trial court were of record. 391 U.S. at 514, 515.

Petitioner's final argument raised under Claim 7 contests the adequacy of the record as to various issues involving pre-trial hearings and other rulings made during the course of the case. Pet. Br. at 86-87. The proceedings in the present case are memorialized in a detailed nine volume record. Limited issues, aspects, and rulings to which Petitioner did not contemporaneously object cannot now be raised here. La. Code Crim. Proc. Ann. art. 841; *Engle*.

The various arguments raised in Petitioner's seventh claim are without merit.

Claim 8 *The Trial Court's Jury Instructions Concerning the Use of Circumstantial Evidence at the Guilt Phase of the Trial*

Petitioner's eighth claim questions the validity of the trial court's jury instruction concerning criminal convic-

tions based on circumstantial evidence. Petitioner contends that pursuant to La. Rev. Stat. Ann. § 15:438, the trial court should have made it clear to the jury that a conviction based on circumstantial evidence must "exclude every reasonable hypothesis of innocence." Petitioner concedes that the desired charge was eventually given; however, he asserts that intervening instructions confused the jury. Pet. Br. at 89-90.

The State contends that no objection was lodged at trial and that Petitioner is barred from raising the issue before this Court. However, regardless of the State's contentions, Petitioner's arguments stressed in Claim 8 are without merit. The trial court instructed the jury that guilt had to be found beyond a reasonable doubt. The court also gave the charge implicit in La. Rev. Stat. Ann. § 15:438. Moreover, review of the record indicates that the charges, taken in their entirety, were not confusing. Petitioner's eighth claim is without merit.

Claim 9 Petitioner's Right to Effective Assistance of Counsel

Petitioner's ninth claim raises various factual and legal issues concerning whether he was afforded effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984). Petitioner raises six scenarios that purportedly support the claim that his counsel was ineffective.

1. Petitioner first argues that counsel's failure to move to suppress or otherwise object to the proffering of the murder weapons was both negligent and prejudicial to the Petitioner. Pet. Br. at 95. The Court is not persuaded by this initial contention. The decision to object to the admission of evidence or contest the validity of searches and seizures are decisions made by counsel based on counsel's trial strategy. So long as the specific decision does not extend beyond the "wide latitude" of practices allowed in the representation of a criminal de-

fendant, *Stickland*, 104 S. Ct. at 2065, this Court should not interfere with counsel's decision.

As testified to by Mr. Capitelli at the evidentiary hearing held on 12 February 1987, counsel for Petitioner did not object to the proffer of the murder weapons because of his trial strategy. Evid. Hear. at 108, 109. Mr. Capitelli believed that the circumstances surrounding the handling of the murder weapons was a weak part of the State's case. It was his strategy not to raise an objection to the introduction of that evidence but to later argue that the linking of the weapons was one of the weaknesses of the State's case. Evid. Hear. at 108, 109. Thus, the decision was made not to object to the introduction of the weapons. Petitioner's arguments raised under the first scenario are without merit.

2. Petitioner next argues that counsel did not adequately prepare for the sanity hearings. Pet. Br. at 101. However, Petitioner's counsel did attempt to prepare Petitioner for the sanity hearings. Evid. Hear. at 101, 102. Petitioner refused to cooperate in this preparation. *Id.* This attitude reflects Petitioner's general opposition to putting forth the insanity defense. Trial Trans. Vol. III, at 851-852.

Related to the issue of the insanity defense, Petitioner also argues that counsel was negligent and caused him "actual prejudice" by not raising the insanity defense (apparently at trial). *See* Pet. Br. at 101-103. Petitioner's argument is that despite the results of three sanity hearings and Petitioner's own insistance upon the withdrawal of his insanity defense, counsel should have girded their loins and proceeded with the insanity defense at trial irrespective of their client's expressed demand that they proceed with the alibi defense. Pet. Br. at par. 220, at 102, 103. This would have caused complete chaos at trial: on one side of the defense table, counsel would have been arguing an insanity defense, while on the other side of the table Petitioner would be

seeking to take the stand in support of his alibi defense. At best, this procedure would have been unacceptable; at worst, it would have been a mockery.

Once petitioner opted for the alibi defense, counsel properly defended him on that basis and did not proceed further with the insanity defense. Each of the issues raised in the second scenario, including the related contentions raised in Pet. Br. at 101-105, are without merit.

3. The third group of facts centers on whether Petitioner was rendered ineffective assistance of counsel due to counsel's alleged failure to "insist upon a proper record." Pet. Br. at 105. Petitioner fails to cite to any authority to substantiate his position. However, the Court finds the nine volume transcript was adequate and preserved the record for reviewing the objections that were properly and timely made by Petitioner.

4. The fourth scenario presented by Petitioner concerns counsel's failure to object to certain jury charges given by the trial court. First, petitioner contends that counsel erred by not objecting to the trial court's instruction relating to aggravating circumstances under La. Code Cr. Proc. Ann. art. § 905.4(d). Since it has already been determined that this jury charge was proper, *see* Claim 1, *supra* at 3, 4, it follows that counsel's failure to object to the proper instruction could not be in error.

Petitioner also contends that counsel erred by not objecting to jury charges relating to the circumstantial evidence. Pet. Br. at 106-107. Since it has already been determined that the circumstantial evidence instruction was not confusing, *see* Claim 8, *supra* at 25, 26, counsel's failure to object to a properly given instruction was not in error.

5. Petitioner's fifth argument raised within Claim 9 contends that counsel failed to proffer mitigating evidence during the sentencing phase of the trial. Pet. Br. at 107. During the evidentiary hearing in this Court, counsel for Petitioner testified that attempts were made

to contact Petitioner's relatives in order to convince them to come to Louisiana to testify. Evid. hear. at 111, 112. However, Petitioner's relatives neither acceded to the request nor did Petitioner desire that they be present. *Id.* Evidence of Petitioner's employment history was reiterated during the sentencing phase. *Id.* Counsel's representation of Petitioner at the sentencing phase was not inadequate.

6. The final argument raised under Claim 9 concerns counsel's alleged failure to apprise the various state courts of the relevance of the decision rendered in *State v. Williams*, 480 So.2d 721 (La. 1985). Petitioner asserts that "had the Louisiana Supreme Court been apprised of the relevancy of *State v. Williams* to Mr. Lowenfield's conviction . . .", such would have affected Petitioner's death sentence. Pet. Br. at 108. As noted above in the discussion of Claim 1, this Court is unable to conclude that the *Williams* decision lends support to Petitioner's cause. *See* Claim 1, *supra*, 3, 4. This Court notes that the Louisiana Supreme Court announced its decision in *State v. Williams* in May of 1985. The decision in Petitioner's case came down from the Louisiana Supreme Court in December of the same year. It is reasonable to conclude that the Louisiana Supreme Court was aware of and "apprised" of its own decision rendered in the same year. Petitioner was rendered effective assistance of counsel and argument six of Petitioner's ninth claim is without merit.

The Supreme Court has observed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 104 S. Ct. at 2064. Here, Petitioner's counsel rendered competent legal services and did not undermine the adversarial process. The various issues raised within the Petitioner's ninth claim are without merit.

CLAIM 10 The Identification Testimony of Diane Fauchaux

Petitioner's tenth claim asserts that the identification testimony of Diane Fauchaux should have been suppressed because it was made after the use of "unduly suggestive tactics" by the police. Pet. Br. at 110. Petitioner claims that the present identification was violative of the principles discussed in *Manson v. Brathwaite*, 432 U.S. 98 (1977).

On review of this case, the Louisiana Supreme Court considered the *Brathwaite* decision in light of the facts and circumstances of the present case. The Court concluded that the identification was reliable. *Lowenfield*, 495 So.2d at 1253, 1254. Applying the same standards of *Brathwaite*, this Court finds that the indentification was reliable and admissible at trial. Witness Fauchaux had an unfettered view of Petitioner. In addition to her visual observations, she noticed Petitioner's accent. Trial Trans. Vol. VIII at 1923. Petitioner's tenth claim is without merit.

CLAIM 11 The Trial Court's Refusal to Permit Petitioner to Recall Anita Jackson to the Stand

Petitioner's eleventh claim centers on whether the trial court erred in denying counsel's request to recall Anita Jackson to the stand. Petitioner contends that said denial was in violation of his sixth amendment and fourteenth amendment rights. Pet. Br. at 112.

It is undisputed that Ms. Jackson was not a suprise witness in the case. Petitioner's counsel knew that Ms. Jackson would testify and was actually given copies of statements that Petitioner's counsel used to conduct its cross-examination of Ms. Jackson. *See* Trial Trans. Vol. VIII at 1944-1960; Pet. Exh. C. at 53. The trial court's denial of counsel's request did not abridge Petitioner's constitutional rights. Petitioner's eleventh claim is without merit.

CLAIM 12 The Sufficiency of the Evidence for Proving Petitioner's Guilt Beyond A Reasonable Doubt

Petitioner's twelfth claim contends that since his conviction was based on circumstantial evidence, there exists a "real and substantial doubt" concerning his guilt. Following *Jackson v. Virginia*, 443 U.S. 307 (1979), the Louisiana Supreme Court rejected this same contention in the course of its careful review. *See* Pet. Br. Exh. C at 54-56. The review by the Louisiana Supreme Court comported with the guidelines set forth in *Jackson*. Further, the record contains a sufficient basis for "a rational factfinder . . . [to] have found the petitioner guilty beyond a reasonable doubt . . ." *Jackson*, 443 U.S. at 325. Petitioner's twelfth claim is without merit.

CLAIM 13 The Comparative Appellate Review of Petitioner's Sentencing

Petitioner's thirteenth claim seems to contend that Louisiana statutory law and state appellate procedures violated Petitioner's constitutional rights. Petitioner also makes bald assertions that the comparative review of his case was faulty under Supreme Court guidelines.

The procedures followed by the Louisiana Supreme Court in its comparative review of the present case evince no constitutional infirmities. *See Lowenfield*, 495 So.2d at 1260-61. On the same note, the Court "cannot say that the punishment is invariably disproportionate to the crime." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Nothing within Louisiana's substantive or procedural laws or its appellate procedures denied Petitioner his federal constitutional rights. Petitioner's thirteenth claim is without merit.

CLAIM 14 Electrocution as a Means of Punishment

Petitioner's fourteenth claim avers that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Pet. Br. at 114. Death

by electrocution does not constitute cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976); *State v. Myles*, 389 So.2d 12 (La. 1980). Petitioner's fourteenth claim is without merit.

CLAIM 15 Capital Punishment as an Excessive Penalty

Petitioner's fifteenth claim contends that capital punishment is an excessive penalty. As discussed under Claim 15, capital punishment is not an excessive penalty, *per se*, and capital punishment is not an excessive penalty within the confines of the present case. Petitioner's fifteenth claim is without merit.

CLAIM 16 Petitioner's Alleged Cumulative Violations as a Source of Constitutional Infringement

Petitioner's final argument asserts that the cumulative effect of the alleged infringements are violative of his constitutional rights. The Court has found that the arguments put forth in each of Petitioner's first fifteen claims do not, independently, mount a constitutional challenge by which this Court could set aside this conviction or sentence. This Court also finds that the collective allegations do not present a constitutional abridgment warranting action by this Court. Petitioner's sixteenth claim is without merit.

More than what these pages reflect has gone into this Court's consideration of the issues raised in this most serious of matters. This Court has been impressed by the diligence and professionalism of able counsel for Petitioner, and, indeed, for the State of Louisiana. A very wide-ranging consideration of all the issues has resulted from their respective input. All considered, the petition must be DENIED. Judgment accordingly.

Signed this 31st day of March, 1987.

/s/ Peter Beer
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3305

LESLIE LOWENFIELD,
Petitioner-Appellant,

versus

C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS, STATE OF LOUISIANA, *et al.*,
Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas

(May 11, 1987)

Before REAVLEY, JOHNSON and DAVIS, Circuit Judges.

DAVIS, Circuit Judge:

The petitioner, Leslie Lowenfield, was convicted of the first degree murder of three persons; the court sentenced him to death on each count on the jury's recommendation. The conviction and sentence was affirmed by the Louisiana Supreme Court, *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S.Ct. 2259 (1986). Post

conviction relief was denied by the state court. *Lowenfield v. Phelps*, 497 So.2d 301 (La. 1986). On Lowenfield's application for federal habeas relief, the district court stayed the execution set for November 19, 1986, so it could carefully consider the petition. Following a full evidentiary hearing, the district court denied habeas relief and vacated its earlier stay of execution; it also denied a certificate of probable cause. Lowenfield filed a notice of appeal from the district court's denial of habeas relief, and he seeks a certificate of probable cause from this court.

I.

FACTS

Petitioner, a native of Guyana, came to Louisiana from Canada in June 1981 and met the primary victim, Sheila Thomas, a deputy sheriff in Jefferson Parish, Louisiana, shortly thereafter. Ms. Thomas, along with her young daughter, victim Shantell Osborne, moved in with Lowenfield later in the summer of 1981. Lowenfield and Ms. Thomas lived together off and on for approximately one year. During this year, Ms. Thomas left Lowenfield on three separate occasions and returned to live with her mother. Lowenfield became increasingly bitter following each separation. When Ms. Thomas returned to her mother's home for the last time, he repeatedly threatened and harrassed Ms. Thomas and her mother, victim, Myrtle Griffin.

In the late afternoon of August 30, 1982, Owen Griffin, Sheila Thomas' stepfather, was in a vacant lot near his home in Marrero, Louisiana playing cards with friends. Owen Griffin heard shots ring out from his home, and ran to the house and rushed inside whereupon more shots rang out. When the police arrived, they found five bodies sprawled about the living area of the house; they found the bodies of Sheila Thomas, her four-year old daughter Shantell, Owen Griffin, his wife Myrtle Griffin, and Carl Osborne, the father of Shantell. All of

the victims had sustained multiple gunshot wounds; each had been shot in the head at close range.

For a more detailed statement of the facts, see the Louisiana Supreme Court's decision in *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S.Ct. 2259 (1986). We now turn to the specific issues raised by petitioner; we will discuss the facts further as needed in our discussion of these issues.

II.

A. Duplication of the Elements of the Underlying Crime and The Aggravating Circumstances

Petitioner argues that the single aggravating circumstance upon which his sentence was based: knowingly creating a risk of death to more than one person, is simply a duplication of the aggravating circumstance the state was required to prove to establish his guilt of first degree murder, specific intent to kill more than one person.[1] Petitioner argues that this aggravating circumstance fails to narrow the class of persons eligible for the death penalty because it does nothing more than duplicate an element of the crime. Petitioner relies primarily on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S.Ct. 546 (1985). In *Collins*, the Eighth Circuit concluded that there is "no escape from the conclusion that an aggravating circumstance which merely

---

[1] La.R.S. 14:30(3) provides:

> First degree murder is the killing of a human being:
>
> * * * *
>
> (3) When the offender has specific intent to kill or inflict great bodily harm upon more than one person;

La. C. Cr. P. Art. 905.4(d) provides:

> The following shall be considered aggravating circumstances:
>
> * * * *
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;

repeats an element of the underlying crime cannot perform the narrowing function [required by the Supreme Court]." *Id.* at 264. But, we expressly rejected this analysis in *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986), where we stated "we fail to see why aggravating circumstances narrow the sentencing discretion any less by being made a constituent element of the crime. The State of Louisiana is entitled to authorize capital punishment for persons guilty of these aggravated acts where the jury does not find that mitigating circumstances justify less than the death penalty." *See also Evans v. Thigpen*, 809 F.2d 239 (5th Cir. 1987); *Wilson v. Butlers*, 813 F.2d 664 (5th Cir. 1987). Thus, based upon clear precedent from this circuit we reject petitioner's arguments presented in this claim.

B. The Trial Court's Failure to Permit Defense Counsel To Withdraw and Appoint Substitute Counsel

Shortly before the trial was scheduled to begin, appointed counsel moved for permission to withdraw as counsel of record. This motion was predicated primarily on counsel's disagreement with Lowenfield over petitioner's refusal to permit them to urge insanity as a defense; the motion was also based on a letter Lowenfield sent counsel threatening them and their families.

Counsel testified at the habeas hearing that the motion to withdraw resulted primarily from their inability to persuade petitioner to urge an insanity defense. Mr. Capitelli testified that once the decision was made to follow Lowenfield's wishes and rely on the alibi defense, his relationship with Lowenfield was good. Both counsel testified that they had little concern about the threatening letter after they learned that it was mailed from the prison where Lowenfield was confined.

The trial judge had to consider whether relieving counsel who were familiar with the facts would result in an inordinate delay of the trial and encourage similar disagreements to seek further delays. The trial judge had

no reason to believe that Lowenfield would enjoy any better relationship with a new attorney.

The Supreme Court in *United States v. Cronic*, 466 U.S. 648 (1984), held that the determination of whether an attorney rendered effective assistance of counsel must concentrate "on the adversarial process, not on the accused's relationship with his lawyer as such." *Id.* at 657 n.21. Based upon the trial record and the testimony before the district court at the habeas hearing, we are persuaded that the adversarial process remained intact during this trial. Petitioner has not demonstrated that the trial court's denial of the motion to substitute counsel was "unreasonable and arbitrary." *Wilson v. Mintzes*, 761 F.2d 275, 287 (6th Cir. 1985).

C. Ineffective Assistance of Counsel

Petitioner contends that his attorneys rendered ineffective assistance of counsel in both the guilt and penalty phases of his trial. We are guided by the teaching of *Strickland v. Washington*, 466 U.S. 668 (1984) on this question in which the Court established two basic requirements for finding ineffective assistance of counsel. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. The Court further explained that:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting

> effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Id. at 689 (citations omitted).

The Court continued:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691. With these principles in mind, we examine the particular claims of petitioner.

1. Trial Counsel's Failure to Produce Evidence of Mitigation at the Sentencing Hearing.

On this claim petitioner complains primarily of counsel's failure to produce evidence of Lowenfield's mental impairments at the sentencing hearing.

Before the sentencing hearing began, Lowenfield and his attorneys discussed whether they should adduce psychiatric testimony. Lowenfield was strongly opposed to it[2] and ultimately persuaded counsel that for tactical reasons this decision was sound. Counsel, at the federal habeas hearing, explained that he believed that the jury had doubts about Lowenfield's guilt that had been difficult for them to resolve. He and Lowenfield concluded that the presentation of psychiatric testimony would telegraph an admission to the jury that Lowenfield had committed the crime and remove any remaining doubts by the jurors of Lowenfield's guilt; they thought that preserving this possible doubt of guilt was more likely to benefit petitioner than psychiatric testimony. Counsel concluded that:

> [the presentation of] psychiatric [evidence] would in effect possibly be more detrimental than helpful because what would have happened would be that we'd have the one psychiatrist concerning his possibility of being insane at the time of the crime and they have three or four psychiatrists saying he was sane at the time of the crime and at that point any jurors that may have been misgiven about his guilt would no longer have those misgivings. He [Lowenfield] expressed to me he didn't want to go forward with that. The more I thought about it, the more I examined it, how long the jury was out, I agreed with that.

Habeas hearing record p. 103.

Lowenfield's mental condition was explored as fully as possible by counsel, given petitioner's lack of cooperation. Counsel and the petitioner considered whether the psychiatrists' testimony would undermine the apparent doubt

---

[2] Immediately before the sentencing hearing began, Lowenfield, outside the presence of the jury, told the court that he opposed the presentation of psychiatric testimony in this phase of the trial. Trial Transcript at 2306.

some of the jurors had of petitioner's guilt. They consciously decided that preserving the doubt of guilt would serve them better. Considering the deference we must give strategic trial decisions under *Strickland*, the failure of counsel to call a psychiatrist was not deficient performance. *Id.* at 689-91.

The only other specific complaint of substance about counsel's performance at the sentencing phase of the trial was his failure to call petitioner's relatives to testify on his behalf. The district court credited counsel's testimony that the petitioner did not wish his relatives to be present at the trial and that in any event the family members were unwilling to come to Louisiana to testify. Both of these findings are supported by evidence presented at the habeas hearing. See Habeas record at p. 111.

Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987), relied upon by petitioner, is easily distinguished. In *Wilson*, counsel did not secure a psychiatric evaluation of his client despite signals that he was suffering from mental defects. Petitioner attached a psychiatric report to his habeas petition that supported his contention of mental defect. No other psychological evidence was in the record. Because the district court conducted no hearing, we held that the record did not "contain sufficient evidence from which the district court could determine whether Simmons [counsel] made a considered strategic decision or whether this decision was reasonable." *Id.* at 672. We remanded for an evidentiary hearing on the question of whether counsel's performance was effective including whether the decision not to produce psychiatric evidence at the sentencing hearing was a considered strategic decision.

In this case the district court conducted a full evidentiary hearing. In contrast to counsel in *Wilson*, Lowenfield's attorneys fully explained petitioner's mental condition; counsel provoked three separate sanity hearings in which a total of four psychiatrists testified after examining Lowenfield. Counsel was present when each

of the psychiatrists interviewed petitioner. Counsel consulted with psychiatrist, Dr. Richard Richaux, also agreed to testify if Lowenfield agreed to permit it. Counsel consulted with Lowenfield about the desireability of presenting psychiatric testimony at the sentencing hearing and both petitioner and counsel decided against it for strategic reasons which counsel articulated in the hearing.

The record fully supports the district court's conclusion that counsel's representation of petitioner at the sentencing hearing was adequate.

2. Counsel's Failure to Object to the Admission of the Murder Weapons

Both weapons that were later established as the murder weapons were discovered by relatives of Sheila Thomas after the murders; one of Ms. Thomas' brothers discovered the rifle the next day under bed coverings on Ms. Thomas' bed while he was preparing to clean the house; another relative discovered the pistol a week later in a heater vent.

Counsel recognized that the failure of the police to discover the guns and the imperfect documentation of the chain of custody of the weapons could create problems for the state. Mr. Capitelli, lead counsel for the petitioner, testified at the habeas hearing that he was persuaded that strategically it was to Lowenfield's advantage to acquiesce in the introduction of the weapons to set the stage for an argument that others were implicated in the murders and that the sloppy police work reflected adversely on the state's entire case.[3] Given the "wide

[3] The reason why I didn't [object to the introduction of the weapons] was totally strategic, a strategic decision I made at the time because at that point, to have objected to the guns, to have objected to the introduction of the guns would have given the prosecutors the chance to argue at the closing phase, Mr. Capitelli wants to use these guns to point at a possible implication of other individuals, yet if you recall, he objected

latitude" allowed counsel by *Strickland*, 466 U.S. at 689 in confecting trial strategy, the district court did not err in concluding that counsel did not perform ineffectively in deciding to allow the weapons to be introduced without objection.

3. Counsel's Failure to Properly Prepare for the Sanity Hearings

Petitioner's counsel made substantial efforts to prepare petitioner for the sanity hearing but petitioner refused to cooperate. Shortly before the trial was scheduled to begin, Lowenfield refused to be interviewed by psychiatrists. The district court, after hearing testimony from counsel and from Lowenfield, did not err in concluding that counsel made reasonable efforts to prepare Lowenfield for his sanity hearing and to persuade him to cooperate; Lowenfield adamantly refused to do so. The district court correctly found no ineffective assistance of counsel in this respect.

4. Counsel's Failure to Investigate the Insanity Defense and to Present this Defense at Trial

This argument is meritless for two reasons. First, the available evidence would hardly have supported a vigorous insanity defense. Three sanity commisions found that Lowenfield was sane with only a single disenting psychiatrist, Dr. Richaux. At the third sanity hearing Dr. Richaux admitted that he did not have "a definitive opinion concerning Mr. Lowenfield's sanity at the time of the offense," but he expressed his tentative opinion that "there is a good possibility that Mr. Lowenfield could have been psychotic" at that time. According to Mr.

---

strenuously to the introduction of these guns, and that was one of the major considerations I felt, in retrospect and at the time that the guns involved were one of the strongest things we could point to to shift the light off of Leslie.

Habeas record p. 109.

Capitelli's testimony at the federal habeas evidentiary hearing, Dr. Richaux was the only psychiatrist who was able to give favorable testimony on the issue of Lowenfield's insanity defense, and his testimony would have likely been rebutted by the remaining psychiatrists from the insanity commission who believed that Lowenfield was sane at the time of the offense.

Second, Lowenfield's refusal to agree to the assertion of an insanity defense precluded counsel from obtaining more evidence. Lowenfield simply would not talk about the insanity defense. He refused to be interviewed by any more psychiatrists, and he would not submit to the psychiatric tests his attorneys had set up for him. Considering the paucity of available evidence to support an insanity defense and Lowenfield's refusal to cooperate in the search for additional evidence, we find no error in the district court's conclusion that counsel was not unreasonable in following their client's instructions and asserting an alibi defense.

We also reject the contention that counsel should have simultaneously asserted at trial both an alibi defense and an insanity defense. We agree with the district court that "this would have caused complete chaos at trial: on one side of the defense table, counsel would have been arguing an insanity defense, while on the other side of the table petitioner would be seeking to take the stand in support of his alibi defense." Lowenfield repeatedly insisted that his attorneys should present an alibi defense and not an insanity defense. Lowenfield's directions were entitled to be followed. The circumstances are extremely rare when counsel is not required to follow his client's instructions on a decision of this nature. *See Autry v. McKaskle*, 727 F.2d 358, 361 (5th Cir. 1984) (attorney's conduct was not constitutionally deficient when he acceded to client's preference for the death penalty over a long prison term). This is not one of those rare cases.

Our reading of this record persuades us that Lowenfield received a vigorous defense. Lead counsel, Mr. Capi-

telli, had worked as a chief assistant district attorney in Orleans Parish, Louisiana, before engaging in private practice and had been involved in forty to fifty capital cases. Our review of this record reveals no failure in the adversary process.

D. Coercion of a Deadlocked Jury Into a Verdict

The jury was charged following the guilt phase of the trial on May 14, 1984 at 11:45 a.m.; they deliberated until 7:45 p.m. when the trial court recessed for the night at the jury's request. The jury resumed its deliberations the next day at 10:05 a.m., and returned with its guilty verdicts at 3:05 p.m.

The sentencing hearing, according to Judge Cannella, commenced three hours later, at 6:05 p.m., and concluded at 8:17 p.m. Following the sentencing hearing, the jury deliberated until 11:55 p.m., at which time the trial court recessed for the night at the jury's request. The jury reconvened the next day, May 16, 1984, at 9:40 a.m. Two hours later defense counsel moved for a mistrial arguing that the elapsed deliberation time, five hours, and the last instruction by Judge Cannella at the guilt phase justified a mistrial.[4] Approximately three hours

---

[4] The supplemental instruction relied upon follows:

> Let me say that I know how much effort you've put into the case already. I know you put a lot of effort into deliberation and I appreciate the effort you put in.
>
> In this note you request certain items. I cannot give the evidence that you requested. There are legal reasons why I cannot give you the evidence. You must rely on your memories on what the evidence, on what evidence you saw and you heard when you were in court. The fact that certain items cannot by law be given to you you [sic] should not hold against either the state or the defendant in this case.
>
> Since I've told you now that I cannot give you these items I order you to go back to the jury room and to deliberate and arrive at a verdict.

Trial Transcript at 2299.

later, counsel reurged their motion. While counsel were arguing their motion for mistrial, the trial judge received a note from the jury indicating that it was deadlocked. The trial court then polled the jury and asked them "do you feel that any further deliberations will enable you to arrive at a verdict?" One juror responded negatively; the balance of the jury answered the question affirmatively. The court instructed the jury to continue its deliberations and repeated parts of its earlier charge, including the statement that if they were unable to reach a verdict, the court would sentence the petitioner to life imprisonment.[5] Thirty minutes later the jury returned its verdict.

The trial judgment must enjoy wide discretion in determining when to declare a mistrial on grounds of a deadlocked jury. *Monroe v. Blackburn*, 748 F.2d 958, 961 (5th Cir. 1984). To amount to a constitutional deprivation, the trial judge's action must constitute coercion that denies the accused a fundamentally fair trial. *Bryan v. Wainwright*, 511 F.2d 644, 646 (5th Cir. 1975).

---

[5] The Court instructed the jury:

> Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room.

Trial transcript at 2350-51.

Our review of this record leads us to agree with the district court that there is no showing of coercion; the record certainly does not demonstrate coercion sufficient to render the trial fundamentally unfair. The jury deliberated thirteen hours before reaching a verdict in the guilt phase and nine and one-half hours before reaching a verdict in the penalty phase. Petitioner does not challenge either supplemental instruction the court gave the jury, and we see nothing about those instructions that can be characterized as coercive. The trial court did not deprive petitioner of a fundamentally fair trial by allowing the jury to deliberate for thirteen hours on the guilt phase and nine and one half hours on the penalty phase. This claim has no merit.

E. Louisiana Improperly Shifted the Burden to Petitioner to Prove his Competence, Improperly Relieved the State of its Burden to Prove Petitioner's Competency and Improperly Refused to Appoint a Psychiatrist to Assist in Presenting an Insanity Defense at Trial.

Lowenfield next argues that he was impermissibly required to carry the burden of proof that he was incompetent to stand trial. Louisiana law presumes the defendant's sanity. La. Rev. Stat. 15:432. The defendant carries the burden of proving by a clear preponderance of the evidence that as a result of a mental disease or defect he lacks the capacity to understand the proceedings against him or to assist in his defense. La. C. Cr. P. Art. 641. *State v. Machon*, 410 So.2d 1065 (La. 1982). Lowenfield argues that this statutory scheme violates the due process clause of the fourteenth amendment. We disagree.

Lowenfield principally relies on *United States ex rel. Bilyew v. Franzen*, 686 F.2d 1238 (7th Cir. 1982). *Bilyew* involved a state murder conviction under an Illinois statute that placed the burden on the defendant to

prove his incompetency to stand trial. *Id.* at 1238. The Illinois Supreme Court upheld the conviction despite its own intervening decision that the statute's apportionment of the burden of proof was unconstitutional. *Id.* at 1244. The district court denied the defendant's petition for habeas corpus and held that any error in misallocating the burden of proof was harmless regardless of whether the statute was unconstitutional. *Id.* at 1244. The Seventh Circuit reversed and held that the error of misallocating the burden of proof was not harmless because "the evidence was very close" and there was a "reasonable possibility" that the defendant would have been found incompetent to stand trial if the state were required to carry the burden of proof. *Id.* at 1246.

Lowenfield relies on *Bilyew*'s statement that "the Fourteenth Amendment requires the State or federal prosecution to shoulder the burden of proving that the defendant is fit to stand trial once the issue of unfitness has been properly raised." *Id.* at 1244. No circuit court has followed this rule, and we refuse to follow it for several reasons. First, *Bilyew*'s conclusion that a state may not constitutionally place the burden of proving incompetency on the defendant merely echoes the opinion of the Illinois Supreme Court.

Second, in declaring that both state and federal prosecutors are required to shoulder the burden of proving competency, we believe *Bilyew* confused the requirements imposed upon federal prosecutors by federal statute with the latitude ordinarily accorded state legislatures under state law to decide the placement of the burden of proof. There is no question that in federal prosecutions, the government bears the burden of proving the defendant's competence to stand trial by a preponderance of the evidence. 18 U.S.C. § 4241. *See United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), *cert denied*, 429 U.S. 1038; *United States v. Makris*, 535 F.2d 899, 905 (5th Cir. 1976), *cert. denied*, 430 U.S. 954. Nevertheless, *Bilyew*

cites *DiGilio* and *Makris* for the proposition that state prosecutors likewise bear the burden of proving competence. Both *Digilio* and *Makris* were decided under the federal criminal statute for determining competency, however, and they have no applicability to the state's latitude to determine burdens of proof in an orderly fashion. We see no reason why Louisiana should be prohibited from placing the burden of proving incompetency on the defendant merely because Congress chose to place that burden on the government in federal prosecutions.

Third, even if *Bilyew* was correct that federal due process prohibits the allocation of the burden of proof to the defendant on this issue, the determination in the instant case is harmless error. Notably, the trial court never relied on the presumption in finding that Lowenfield was competent to stand trial. Furthermore, the evidence strongly supports the court's determination that Lowenfield was competent to stand trial, and there is no reasonable probability that a different burden of proof would have made a difference. The test of competency has long been established by the Supreme Court as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960). The evidence of Lowenfield's competence to stand trial satisfies both *Dusky* and the similar test under Louisiana law announced in *State v. Bennett*, 345 So.2d 1125, 1138 (La. 1977). Lowenfield exhibited his ability to make important decisions by rejecting the use of the insanity defense in a reasoned manner.[6] The record reflects that

---

[6] The defendant testified:

> . . . I plead not guilty and my reason for pleading not guilty is that I wasn't in the State of Louisiana in August . . . August 30, 1982, the day I was accused of a crime. . . . I wished not to plead not guilty by reason of insanity because reason of

Lowenfield also took notes during the course of the trial in order to assist his trial counsel. He also furnished names and addresses of alibi witnesses in Florida. Most importantly, none of the doctors on the sanity commission identified a mental disease or defect which could form the basis of a finding of incompetency. The psychiatrists on the three sanity commissions were unanimous in their opinion that Lowenfield was competent to stand trial, with the sole exception of Dr. Richaux whose determination was based on the problems associated with Lowenfield's belief that his attorneys were in a conspiracy against him, rather than the existence of any mental disease or defect.

Any right to a psychiatrist to assist in the presentation of the defense became moot after petitioner voluntarily withdrew his insanity defense. The only issue at trial became whether petitioner was in the vicinity of New Orleans, Louisiana on the date of the crime and not whether he suffered from mental deficiencies. The district court correctly rejected petitioner's claims for habeas relief predicated on these grounds.

Petitioner also contends that counsel had no opportunity to present psychiatric testimony in the sentencing hearing because the court only allowed a short recess after the guilty verdict was rendered and before the sentencing hearing began. As discussed earlier, Lowenfield and counsel made a considered decision not to present psychiatric testimony and petitioner did not ask the trial court for a further recess within which to obtain psychiatric testimony. This argument also has no merit.

---

insanity is telling the court that this person did something he wasn't responsible for something. And to the best of my knowledge I never had no mental illness in my whole entire life and up to this moment I do not have any mental problems. And I advised him to withdraw the plea because its telling, you're telling the court plainly to plead reasonable insanity. You're looking for a way out . . . .

F. Arbitrary Factors Introduced at the Sentencing Hearing in Violation of the Eighth and Fourteenth Amendments

Petitioner first argues that the admission of a bill of information filed more than a month after Ms. Thomas' death charging petitioner with making harrassing phone calls is an arbitrary factor that requires issuance of the writ. The bill of information was offered by the state to show the presence of the second aggravating circumstance: that one of the victims was a witness in a prosecution against the petitioner. The Louisiana Supreme Court held that the state failed to establish this aggravating factor because the bill of information was not pending at the time of Ms. Thomas' murder. The Louisiana Supreme Court also determined that the trial court erred in admitting this bill of information but concluded that "[g]iven the overwhelming enormity of defendant's crime, it is inconceivable the additional evidence that the defendant was charged with making harrassing phone calls could have prejudiced defendant." *State v. Lowenfield*, 495 So.2d 1245, 1258 (La. 1985). In order to rise to constitutional proportions, a violation of state evidentiary rules must be of such a magnitude that it constitutes a denial of fundamental fairness. *Cronnon v. Alabama*, 587 F.2d 246, 250 (5th Cir.), *cert. denied*, 440 U.S. 974 (1974). Given the relative insignificance of this item of evidence in the prosecution of a crime as heinous as this, we agree with the the Louisiana Supreme Court that it was not prejudicial; its admission certainly does not rise to the level of a denial of fundamental fairness.

Petitioner's second evidentiary point is also meritless. Petitioner complains of the introduction, during the sentencing hearing, of evidence of his conviction of attempted rape in Canada. He complains that no showing was made that the defendant was afforded all of the constitutional protection in the Canadian case to which he would otherwise be entitled under United States law. *Lewis v. United*

States, 445 U.S. 55, 57 (1980). But, this is not the standard that applies to a sentencing hearing in a capital case.

In *Mattheson v. Maggio*, 714 F.2d 362, 365 (5th Cir. 1983), we made it clear that a habeas petitioner has the burden of proving that convictions used by the state in a sentencing hearing to illustrate the petitioner's character propensities were constitutionally defective. A trial court has broad discretion in the sentencing phase of a capital case to permit the jury to receive relevant information that will assist them in predicting the future behavior of the accused. *See Milton v. Procunier*, 744 F2d. 1091, 1097 (5th Cir. 1984).

G. Change of Venue

Petitioner argues that the trial court erred in denying his motion for a change in venue predicated on two arguments: pretrial publicity and the close working relationship between the victim, Sheila Thomas, and judges of the court in which petitioner was tried.

The evidentiary hearing conducted by the district court fully supports the district court's finding that the trial judge, Judge Canella, was not personally acquainted with Sheila Thomas or her family and became aware that she had apparently escorted prisoners to his courtroom only after the trial proceedings in this case had begun. Ms. Thomas was one of fifteen or twenty deputies who transported prisoners to all fifteen divisions of the 24th Judicial District Court. After her death, Judge Canella recalled having seen Ms. Thomas in his courtroom but did not recall ever speaking with her. The evidence also supported the finding that the relationship between Judge Canella and Judge Collins, who did know the victim and her family, would not prevent Judge Canella from impartially trying petitioner's case. The only contact Judge Canella had with Judge Collins about this case was on the eve of one of the hearings on petitioner's motion for

change of venue; Judge Canella asked Judge Collins about the procedure he followed in handling a similar motion. This limited contact is insufficient to call Judge Canella's impartiality into question.

We also agree with the district court that petitioner has had a full and fair opportunity to establish prejudice from pretrial publicity. *See Irvin v. Dowd*, 366 U.S. 717 (1961).

The transcript of the voir dire examination occupies several hundred pages; Counsel were given wide latitude in conducting their examination. Of the jurors selected, only four recalled having heard about the case. They all verified that they could sit as a fair and impartial juror on petitioner's case.

The record in this case does not support imposition of the rule announced in *Rideau v. Louisiana*, 373 U.S. 723 (1963), that requires a court to presume the jury venire was prejudiced against petitioner. As we stated in *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981):

> The principle distilled from this holding [Rideau] by courts subsequently discussing the case is that where a petitioner adduces evidence of inflammatory, prejudicial pretrial publicity that so pervades or saturates the community as to render virtually impossible a fair trial by an impartial jury drawn from that community, "[jury] prejudice is presumed and there is no further duty to establish bias."

The pretrial publicity in this case does not approach the level required to impose the *Rideau* rule.

Petitioner points to no evidence in the record and our review of it has disclosed none that would demonstrate the "actual identifiable prejudice" from the pretrial publicity required to warrant issuance of the writ. *Mayola*, 623 F.2d at 996.

With respect to claimed imperfections of several of the jurors actually chosen, we fully agree with the dis-

trict court's reasons for rejecting petitioner's arguments and adopt those reasons as our own.

H. Identification Testimony of Diane Faucheux

Lowenfield argues that the identification testimony by cab driver Diane Faucheux should have been suppressed because it was made as a result of "unduly suggestive tactics" by the police. A detective who knew that Lowenfield frequently used cabs showed Lowenfield's picture to various cab drivers, including Ms. Faucheaux, at the Westbank Cab Company. Ms. Faucheux, at that time, failed to identify Lowenfield as one of her passengers. Having failed to obtain an identification, the detective reviewed the taxi logs and discovered that Ms. Faucheux had picked up a fare at the petitioner's apartment on the day of the murders. The detective again asked Ms. Faucheux if she recognized Lowenfield's photograph. After being shown the log and Lowenfield's photographs, Ms. Faucheux positively identified Lowenfield as the fare she delivered one block from the murder scene; she also recalled that Lowenfield spoke with an accent. The officer then left and gave Ms. Faucheux a picture of Lowenfield with instructions to contact the police if she saw him again.

Ms. Faucheux testified that she was able to identify Lowenfield because she looked at his face when she helped him load and unload packages from the cab. Additionally, she conversed with him during the hour long ride and as a result frequently looked back in the mirror. She also got a good look at his face when he paid the fare.

Petitioner argues that the actions of the detective in showing Ms. Faucheux the single photograph of Lowenfield with instructions to contact the police if she saw factor in determining the admissibility of identification testimony is whether, under the totality of the circumstances, the identification was reliable. *Manson v. Brath-*

waite, 432 U.S. 98 (1977); *Stovall v. Denoe*, 388 U.S. 293 (1967). In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court established that "convictions based on eyewitness identification at trial following pretrial identification by photographs will be set aside on that ground only if the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *See also Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982).

The only suggestive indicia that tends to undermine Ms. Faucheaux's identification is the act of the police in showing her a solitary picture and allowing her to keep a copy. But we conclude that this alone is not sufficient to create a "very substantial likelihood of irreparable misidentification." *Simmons*, 390 U.S. at 384. Because of Ms. Faucheux' close contact with Lowenfield for approximately an hour during which time she observed him closely on several occasions and heard him speak in his distinctive accent, we conclude that the "identification was encompassed by indicia of reliability." *Nettles v. Wainwright*, 677 F.2d 410, 414 (5th Cir. 1982). This claim is meritless.

III

Lowenfield also argues that: (1) the trial court's jury instructions on circumstantial evidence and the burden of proof were erroneous, (2) the trial court's refusal to permit petitioner to recall Anita Jackson to the stand violated petitioner's rights under the sixth and fourteenth amendments, (3) the evidence was insufficient for the jury to find petitioner guilty beyond a reasonable doubt, (4) electrocution is a cruel and unusual means of punishment, (5) capital punishment is an excessive penalty, (6) the cumulative effect of the violation of petitioner's rights constitutes a violation of petitioner's Constitutional rights. We agree with the district court that all of these

claims lack merit. We adopt the opinion of the district court on these issues and append to this opinion the relevant portion of the district court opinion.

In conclusion, because Lowenfield has not made a substantial showing of the denial of a federal right, we DENY a certificate of probable cause and also DENY a stay of execution. *See Barefoot v. Estelle*, 463 U.S. 880, 883 (1983). The mandate shall issue forthwith.

APPENDIX

Excerpts from opinion of United States District Court, Eastern District of Louisiana, dated March 31, 1987, in Civil Action No. 86-5036, Section M (1).

V.

• • • •

Regarding the imperfections of the jurors actually chosen, this court read those applicable portions of the transcripts. Four of the jurors had heard about the case on the news. As discussed above, this, alone, means little, and Petitioner takes it no further. One of the jurors questioned his ability to sit through the whole trial and be fair-minded. However, this statement was made in the context of concern for his wife and new baby; he was worried about leaving them alone. His concern did not relate to this case as such, and once his concerns over his family were addressed, he agreed that he held no preconceptions. He was not challenged. However, one juror, Catherine Roberts, expressed an inability to not consider Petitioner's not taking the stand:

> MS. ROBERTS: . . . I know right now the idea of his not being up there, I know if I'm thinking now I'm sure it might happen.
>
> MR. CAPITELLI: . . . I need to know the answer now. I'm not going to get a chance to do it later. If it is causing you concern now, I need to ask you to articulate it in terms of would that effect in your mind concern you to the point you could not be totally fair?
>
> MS. ROBERTS: Yes.

Transcript, 9 May 1984, at 168. Ms. Roberts was asked a few more unrelated questions. She was not challenged. Petitioner apparently felt that she was a good juror for his cause. It may have been the way she looked, her religious affiliation (Luteran (sic)), or something else.

In any event, Petitioner was satisfied with her. Further, Petitioner *did* take the stand, so Ms. Roberts's reservations were mooted.

• • • •

Claim 8 The Trial Court's Jury Instructions Concerning the Use of Circumstantial Evidence at the Guilt Phase of the Trial

Petitioner's eighth claim questions the validity of the trial court's jury instruction concerning criminal convictions based on circumstantial evidence. Petitioner contends that pursuant to La. Rev. Stat. Ann. § 15:438, the trial court should have made it clear to the jury that a conviction based on circumstantial evidence must "exclude every reasonable hypothesis of innocence." Petitioner concedes that the desired charge was eventually given; however, he asserts that intervening instructions confused the jury. Pet. Br. at 89-90.

The State contends that no objection was lodged at trial and that Petitioner is barred from raising the issue before this Court. However, regardless of the State's contentions, Petitioner's arguments stressed in claim 8 are without merit. The trial court instructed the jury that guilt had to be found beyond a reasonable doubt. The court also gave the charge implicit in La. Rev. Stat. Ann. § 15:438. Moreover, review of the record indicates that the charges, taken in their entirety, were not confusing. Petitioner's eighth claim is without merit.

• • • •

Claim 11 The trial Court's Refusal to Permit Petitioner to Recall Anita Jackson to the Stand

Petitioner's eleventh claim centers on whether the trial court erred in denying counsel's request to recall Anita Jackson to the stand. Petitioner contends that said denial was in violation of his sixth amendment and fourteenth amendment rights. Pet. Br. at 112.

Pit is undisputed that Ms. Jackson was not a surpise witness in the case. Petitioner's counsel knew that Ms. Jackson would testify and was actually given copies of statements that Petitioner's counsel used to conduct its cross-examination of Ms. Jackson. See Trial Trans. Vol. VIII at 1944-1960; Pet. Exh. C. at 53. The trial court's denial of counsel's request did not abridge Petitioner's constitutional rights. Petitioner's eleventh claim is without merit.

Claim 12 The Sufficiency of the Evidence for Proving Petitioner's Guilt Beyond a Reasonable Doubt

Petitioner's twelfth claim contends that since his conviction was based on circumstantial evidence, there exists a "real and substantial doubt" concerning his guilt. Following *Jackson v. Virginia*, 443 U.S. 307 (1979), the Louisiana Supreme Court rejected this same contention in the course of its careful review. *See* Pet. Br. Exh. C at 54-56. The review by the Louisiana Supreme Court comported with the guidelines set forth in *Jackson*. Further, the record contains a sufficient basis for "a rational factfinder . . . [to] have found the petitioner guilty beyond a reasonable doubt. . . . *Jackson*, 443 U.S. at 325. Petitioner's twelfth claim is without merit.

• • • •

Claim 14 Electrocution as a Means of Punishment

Petitioner's fourteenth claim avers that death by electrocution constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution. Pet. Br. at 114. Death by electrocution does not constitute cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976); *State v. Myles*, 389 So.2d 12 (La. 1980). Petitioner's fourteenth claim is without merit.

Claim 15 Capital Punishment as an Excessive Penalty

Petitioner's fifteenth claim contends that capital punishment is an excessive penalty. As discussed under Claim 15, capital punishment is not an excessive penalty, *per se*, and capital punishment is not an excessive penalty within the confines of the present case. Petitioner's fifteenth claim is without merit.

Claim 16 Petitioner's Alleged Cumulative Violations as a Source of Constitutional Infringement

Petitioner's final argument asserts that the cumulative effect of the alleged infringements are violative of his constitutional rights. The Court has found that the arguments put forth in each of Petitioner's first fifteen claims do not, independently, mount a constitutional challenge by which this Court could set aside his conviction or sentence. This Court also finds that the collective allegations do not present a constitutional abridgment warranting action by this Court. Petitioner's sixteenth claim is without merit.

Sam D. Johnson, Circuit Judge, dissenting:

The supplemental *Allen* charge urging the jury to reach a verdict and the *Brasfield* inquiry into the jury's numerical division have no place in the sentencing phase of a death penalty case. A jury considering whether to impose a life or death sentence is likely to interpret these actions of the judge as a suggestion or command to choose death. With great deference to the opinion of the majority, I therefore respectfully dissent.

A.

The *Allen* charge, deriving its name from *Allen v. United States*, 164 U.S. 492, 17 S. Ct. 154 (1896), refers to "supplemental instructions urging a jury to forego their differences and come to a unanimous decision." [1] The charge, so often criticized for its coercive tendencies,[2] has been upheld [3] as not per se unconstitutional in the

---

[1] United Staes v. Bottom, 638 F.2d 781, 786 n.4 (5th Cir. 1981); *see also* United States v. Taylor, 530 F.2d 49, 51 n.5 (5th Cir. 1976) ("The term 'Allen Charge' is commonly used to refer to supplemental charges given to deadlocked juries encouraging jurors to reconsider their position").

[2] *E.g.*, United States v. Blevinal, 607 F.2d 1124, 1128-29 (5th Cir. 1979) (Godbold, J., dissenting), *cert. denied*, 445 U.S. 928 (1980); United States v. Amaya, 509 F.2d 8, 12-13 (5th Cir. 1975), *cert. denied*, 429 U.S. 1101 (1977); United States v. Vigo, 435 F.2d 1347, 1350 (5th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); Thaggard v. United States, 354 F.2d 735, 739-41 (5th Cir. 1965) (Coleman, J., concurring), *cert. denied*, 383 U.S. 958 (1966); Walker v. United States, 342 F.2d 22, 27-29 (5th Cir.) (Brown, J., dissenting), *cert. denied*, 382 U.S. 859 (1965); Green v. United States, 309 F.2d 852, 854-56 (5th Cir. 1962); Andrews v. United States, 309 F.2d 127, 129-30 (5th Cir. 1962) (Wisdom, J., dissenting), *cert. denied*, 372 U.S. 946 (1963); Huffman v. United States, 297 F.2d 754, 755-59 (5th Cir.) (Brown, J., dissenting), *cert. denied*, 370 U.S. 955 (1962).

[3] United States v. Bailey, 480 F.2d 518, 518 (5th Cir. 1973) (en banc).

usual criminal case.[4] Nevertheless, the appellate court must scrutinize[5] an *Allen* charge for compliance with "two requirements": "(1) the semantic deviation from approved '*Allen*' charges cannot be so prejudicial to the defendant as to require reversal, and (2) the circumstances surrounding the giving of an approved '*Allen*' charge must not be coercive."[6] We proceed on a case by case basis[7] under a totality of the circumstances test.[8] The "potential for coercion is present in even the most mild supplemental instructions,"[9] and an *Allen* charge wholly unobjectionable in its content may nonetheless be coercive in light of the circumstances under which it was given.[10] Finally, although we should not grant habeas corpus relief to a state defendant merely because the state trial court made minor deviations from approved *Allen* charges,[11] the defendant may show in federal habeas corpus proceedings that the charge was unconstitutionally coercive[12] under the totality of the circumstances.[13]

---

[4] *See Bailey*, 480 F.2d at 520 (Goldberg, J., concurring in part and dissenting in part).

[5] *Blevinal*, 607 F.2d at 1126.

[6] *Bottom*, 638 F.2d at 787; *see also* United States v. Cheramie, 520 F.2d 325, 328 (5th Cir. 1975).

[7] United States v. Kimmel, 777 F.2d 290, 294 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1947 (1986).

[8] United States v. Fossler, 597 F.2d 478, 484-85 (5th Cir. 1979).

[9] *Blevinal*, 607 F.2d at 1126.

[10] *Fossler*, 597 F.2d at 483-85; United States v. Williams, 447 F.2d 894, 899-900 (5th Cir. 1971).

[11] *See Cheramie*, 520 F.2d at 330 n.6.

[12] Bryan v. Wainwright, 511 F.2d 644, 646 (5th Cir.), *cert. denied*, 423 U.S. 837 (1975).

[13] The majority opinion suggests that Lowenfield has not challenged the *Allen* charge. *Supra* at 17. Though he has not ex-

Similarly, trial judge inquiry into the numerical division of the jury is also coercive. In *Brasfield v. United States*, 272 U.S. 448, 449-50, 47 S. Ct. 135, 135-36 (1926), the Supreme Court condemned this practice as a ground for reversal. In *Brasfield*, the practice was condemned, even though the jury had not revealed "which number favored a conviction." A *Brasfield* inquiry, especially in conjunction with an *Allen* charge, requires reversal.[14] Debate has been sparked elsewhere over the question whether the *Brasfield* inquiry alone is a ground for relief in a federal habeas corpus proceeding.[15] At the very least, however, the presence of a *Brasfield* inquiry tends to show unconstitutional coercion under the totality of the circumstances.[16]

B.

The "effect upon a divided jury" of an *Allen* charge or *Brasfield* inquiry "will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts."[17] We cannot enter the jury room during deliberations; we cannot see into the mind of the deliberating juror. Thus, when we examine a case and test it for trial judge coercion of the jury

---

plicitly challenged the wording of the *Allen* charge, Lowenfield does contend that the circumstances at sentencing, including the fact that an *Allen* charge was given, show that the jury was coerced. Petitioner's Memorandum of Law at 29-33.

[14] United States v. Chanya, 700 F.2d 192, 193-94 (5th Cir. 1983), *cert. denied*, 466 U.S. 943 (1984); *Cheramie*, 520 F.2d at 331 n.8; United States v. Hayes, 446 F.2d 309, 312 (5th Cir. 1971); Cook v. United States, 254 F.2d 871, 873-75 (5th Cir. 1958).

[15] *Compare, e.g.*, Ellis v. Reed, 596 F.2d 1195, 1197 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979), *with id.* at 1201-02 (Winter, J., dissenting).

[16] *Ellis*, 596 F.2d at 1200; Jones v. Norvell, 472 F.2d 1185, 1185-86 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973).

[17] *Brasfield*, 272 U.S. at 450, 47 S. Ct. at 135-36.

under the totality of the circumstances, we must resort to reasonable inference and supposition.[18]

In the present case, the jury deliberated some thirteen hours in the guilt-innocence phase. The jury began deliberating in the guilt-innocence phase on May 14, 1984. After further deliberations on May 15, 1984, the jury reached its verdict at 3:05 p.m. in this phase of the trial. That same day, May 15, 1984, at 6:05 p.m., over defense counsel objection,[19] the trial judge began the sentencing phase of trial. He conducted the sentencing hearing, instructed the jury on sentencing, and directed the jury to begin deliberating on the question of life or death. Deliberations began at 8:17 p.m. After deliberating until 11:55 p.m. that evening, the jury complained that it was hungry and tired and that it had already come up with one verdict that day.[20] Only then did the trial judge recess for the night. The next day, May 16, 1984, at 9:40 a.m., the jury continued deliberating. It continued its deliberations for more than five hours before telling the trial judge, in a note, that it was unable to agree upon a recommendation.

In his initial sentencing charge to the jury, the trial judge had explained that, in accordance with article 905.8 of the Louisiana Code of Criminal Procedure, if "the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."[21] Nevertheless, upon the jury's representation or deadlock in its note to the judge, the

---

[18] *See Cheramie*, 520 F.2d at 331-32; *Amaya*, 509 F.2d at 12-13; *Williams*, 447 F.2d at 900.

[19] "I request a twenty-four to forty-eight hour delay for purposes to give them time to cool, the jury to cool from the verdict and also in preparation."

[20] "I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired."

[21] La. Code Crim. Proc. Ann. art. 905.8 (West 1984).

trial judge for the first time declined to invoke the article 905.8 procedure. Instead, the judge had the jury return to the courtroom and instructed it again on the article 905.8 procedure. The judge then asked the jury "if further deliberations would be helpful in obtaining a verdict." The judge determined that four jurors felt further deliberations would not be helpful; eight jurors stated that further deliberations would be helpful. For the second time, the judge declined to accept the deadlock and apply the article 905.8 procedure. The judge then, purporting to rephrase the question, determined to ask the same question again. He asked, "Do you feel that any further deliberations will enable you to arrive at a verdict?" This time, eleven jurors answered yes; one juror, however, persisted in saying that further deliberations would not be helpful. For the third time, the judge declined to accept the deadlock. Instead, he gave the *Allen* charge, urging the jurors "to reexamine your own views and to change your opinion if you are convinced you are wrong" "with the objective of reaching a just verdict," and directed further deliberations. Within thirty minutes, the jury returned a verdict recommending death.

This sequence of events gives rise to a strong inference of coercion at the sentencing phase of trial. Taking the guilt-innocence and sentencing phases together, the jury had deliberated without meaningful break for approximately twenty-two or more hours.[22] When the jury first indicated its deadlock, the trial judge declined to impose life imprisonment under article 905.8, which the judge had stated would apply in the event of deadlock. The jurors dissenting from the recommendation of death might well have understood that the judge favored the death penalty. The judge then reinforced this understanding by twice polling the jury and delivering the *Allen* charge.

---

[22] *See Kimmel*, 777 F.2d at 295 (length of deliberations as factor).

Four jurors were isolated by the first polling as being opposed to further deliberations. To be sure, the judge had asked, not directly about the jury's numerical division on the question or life versus death, but about its division over the helpfulness of further deliberations. Nevertheless, it is reasonable to conclude that the four jurors opposing further deliberations also opposed the recommendation of death; those jurors who would produce a deadlock by opposing further deliberations knew from what the trial judge had told them about article 905.8 that a deadlock would result in life imprisonment. Clearly, these four knew that the same logic was apparent to the trial judge.

Then, in quick succession to his first polling, the judge, while purporting to rephrase the question, effectively rejected the jurors' responses to the first polling by posing the same question. With their position on the ultimate question exposed, the four jurors might well have understood the second polling on the same question as a signal from the judge that he favored the death penalty. The result of the second polling was predictable: Four dissenters had been whittled down to one. By then rejecting this deadlock, the judge again signalled with inescapable clarity to the one remaining hold-out juror that the bench favored the death penalty. At this point, the judge urged the jurors to return a unanimous verdict. Within thirty minutes,[23] they complied.

The conjunction of the *Brasfield* inquiry and an *Allen* charge is especially condemned because

> the coercive impact of even a modest *Allen* charge is heightened when preceded by any inquiry as to the jury's numerical diversion. When that is done, the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction

---

[23] *See Fossler*, 597 F.2d at 485 (shortness of time from delivery, of *Allen* charge to rendering of verdict as factor).

> and that it is, therefore, directed toward the minority jurors.[24]

In practical effect, a trial judge thereby tells minority jurors, especially when their position is known to the judge, to abandon that position. That occurred here: first to the four dissenting jurors and then a second time to the last dissenting juror.

C.

Were this an ordinary criminal case, the coercive practices outlined above would perhaps be constitutionally permissible. This is not, however, an ordinary case. Here a man has been condemned to death. Because of the "qualitative difference" between death and all other punishments, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." [25] Consequently, the Supreme Court " 'has condemned procedures in capital cases that might be completely acceptable in an ordinary case.' " [26]

In addition to the need for extreme reliability in capital cases, the capital sentencing jury is peculiarly vulnerable to coercion, intended or effective, from the bench. In the usual criminal case, the jurors apply *common* legal norms supplied by the court's instructions. By contrast, the breadth of mitigating evidence and considerations

---

[24] Cornell v. Iowa, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *see also* United States v. Sae-Chua, 725 F.2d 530, 531-32 (9th Cir. 1984).

[25] Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991 (1976) (opinion of Stewart, Powell, Stevens, JJ.) (footnote omitted).

[26] Strickland v. Washington, 466 U.S. 668, 705, 104 S. Ct. 2052, 2073 (1984) (Brennan, J., concurring in part and dissenting in part) (quoting Barefoot v. Estelle, 463 U.S. 880, 913, 103 S. Ct. 3383, 3405 (1983) (Marshall, J., dissenting)).

available to capital sentencing jurors[27] especially contributes to make theirs a "'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'"[28] Unlike jurors in the usual case, capital sentencing jurors do not necessarily apply the same norms to mitigating evidence. Under these circumstances, deadlock may readily result and persist with no available means of resolution—unless by coercion.

As a society we have evolved too far to permit such coercion of jurors in death penalty cases. Given the critical need for caution in capital cases as well as the particular vulnerability of capital sentencing jurors, the inherently coercive *Allen* and *Brasfield* practices implemented at the sentencing phase of Lowenfield's trial must be condemned as constitutionally repugnant.[29] Because the majority declines to do so, I must dissent.

---

[27] Hitchcock v. Dugger, 55 U.S.L.W. 4567, 4567-69 (U.S. Apr. 22, 1987); Skipper v. South Carolina, —— U.S. ——, 106 S. Ct. 1669, 1670-71 (1986); *see* La. Code Crim. Proc. Ann. art. 905.5(h) (West 1984).

This was particularly so in the present case. As the majority opinion explains *supra* at 3-5, the single valid aggravating circumstance supporting Lowenfield's sentence had been found at the guilt-innocence phase of the trial. At sentencing, there remained only mitigating evidence to consider.

[28] Turner v. Murray, —— U.S. ——, 106 S. Ct. 1683, 1687 (1986) (opinion of White, Blackmun, Stevens, O'Connor, JJ.) (quoting Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2645 n.7 (1985) (quoting Zant v. Stephens, 462 U.S. 862, 900, 103 S. Ct. 2733, 2755 (1983) (Rehnquist, J., concurring in judgment))).

[29] *See* Rush v. State, 491 A.2d 439, 448-54 (Del. 1985); Patten v. State, 467 So. 2d 975, 975, 979-80 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985); Rose v. State, 425 So. 2d 521, 524-25 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983).

SUPREME COURT OF THE UNITED STATES

No. 86-6867

LESLIE LOWENFIELD,

Petitioner

v.

C. PAUL PHELPS, SECRETARY LOUISIANA DEPARTMENT OF CORRECTIONS, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered that this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2 presented by the petition.

June 22, 1987

Supreme Court, U.S.
FILED
AUG 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD,

Petitioner,

v.

C. PAUL PHELPS,
Secretary of the Department of Corrections
State of Louisiana, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONER

Of Counsel:
MAURICE ROSS
395 South End Avenue
New York, New York 10280

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

GARY S. GUZY *
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 483-8860
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. 789-0096 - WASHINGTON, D.C. 20001

THE QUESTIONS PRESENTED

(1) Did the sentencing hearing violate the petitioner's right to an individualized, reasoned and calm determination of whether a death sentence was appropriate and his right to due process and an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, where the circumstances demonstrated the threat of coercion and improper influence on the jury, and included the jury's avowed distress, disagreement and confusion after more than eight hours of deliberation; the trial court's questioning of the foreman and twice polling the jurors; three announced deadlocks; and a so-called "blasting" charge urging a unanimous verdict—all of which served no legitimate purpose since Louisiana provided for an automatic sentence of life without parole in the event of jury disagreement?

(2) Did Louisiana's capital sentencing statute, as applied to petitioner, violate the Eighth and Fourteenth Amendments to the United States Constitution where the death sentence was based on a single aggravating circumstance found in the sentencing phase hearing which did no more than duplicate an element of the underlying crime found at the guilt phase?

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. The Sentencing Hearing was Unfair and Coerced a Death Verdict in Violation of Due Process and the Eighth Amendment	11
A. Under All the Circumstances, the Conduct of the Sentencing Hearing Was Coercive and Unfair	13
B. Judicial Coercion of the Sentencing Jury Deprived Petitioner of Due Process	24
C. The Sentencing Hearing Violates the Cruel and Unusual Punishment Clause and the Due Process Clause Because It Is Inconsistent With the Principles Established in This Court's Post-*Furman* Capital Punishment Decisions	28
II. Petitioner's Death Sentence, Based on a Sole Statutory "Aggravating" Circumstance That Merely Repeats an Element of the Crime, Violates the Eighth Amendment Requirement that Sentencer Discretion Be Directed and Limited So As to Minimize the Risk of Arbitrary and Capricious Executions	30

TABLE OF CONTENTS—Continued

Page

A. The Louisiana Statute Permitted a Sentence of Death To Be Imposed In This Case Based Upon An "Aggravating" Circumstance That Merely Repeats An Element of the Crime 31

B. The Eighth Amendment Requires that a Sentence of Death Be Based on At Least One Aggravating Circumstance That Genuinely Narrows the Death-Eligible Class From Among Convicted Murderers 34

C. The Louisiana Jury Exercised Untrammeled Discretion in Its Sentencing Determination .. 37

D. Any Arguable Legislative Narrowing At the Guilt Stage Fails to Satisfy *Furman's* Mandate For Reliable Capital Sentencing 39

E. Upholding the Decision Below Would Set into Process An Intrusive Constitutional Inquiry into the Adequacy of State Substantive Criminal Laws 45

F. The *Pro Forma* Consideration Given to Aggravating Circumstances at Petitioner's Sentencing Hearing Denied Due Process 46

CONCLUSION 50

TABLE OF AUTHORITIES

Cases Page

Adams v. Texas, 448 U.S. 38 (1980) 43, 44, 49
Allen v. United States, 164 U.S. 492 (1896) 4, 16
Arizona v. Rumsey, 467 U.S. 203 (1984) 47
Azbill v. State, 88 Nev. 240, 495 P.2d 1064 (1972) .. 17
Barclay v. Florida, 463 U.S. 939 (1983) 36, 45
Beck v. Alabama, 447 U.S. 625 (1980) 21, 29
Booth v. Maryland, 55 U.S.L.W. 4836 (U.S. June 15, 1987) 23, 28
Brasfield v. United States, 272 U.S. 448 (1926) ....*passim*
Bullington v. Missouri, 451 U.S. 430 (1981) 47
Caldwell v. Mississippi, 472 U.S. 320 (1985) .....*passim*
California v. Brown, 107 S. Ct. 837 (1987) .....*passim*
California v. Ramos, 463 U.S. 992 (1983) 34, 45
Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S. Ct. 546 (1985) 39
Commonwealth v. Spencer, 442 Pa. 328, 275 A.2d 299 (1971) 17
Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) 20
Duling v. Ohio, 408 U.S. 936 (1972) 40
Duncan v. Louisiana, 391 U.S. 145 (1968) 12
Eddings v. Oklahoma, 455 U.S. 104 (1982) 12, 34
Estelle v. Smith, 451 U.S. 454 (1981) 43, 47
Estes v. Texas, 381 U.S. 532 (1965) 25
Evitts v. Lucey, 469 U.S. 387 (1985) 27, 47
Fields v. State, 487 P.2d 831 (Alaska 1971) 17
Flowers v. State, 441 So. 2d 707 (La. 1983), *cert. denied*, 466 U.S. 945 (1984) 38
Ford v. Strickland, 696 F.2d 804 (11th Cir.) (*en banc*), *cert. denied*, 464 U.S. 865 (1983) 47
Furman v. Georgia, 408 U.S. 238 (1972) 31, 34, 45
Gardner v. Florida, 430 U.S. 349 (1977) 10, 26, 30
Godfrey v. Georgia, 446 U.S. 420 (1980) 10, 37
Gregg v. Georgia, 428 U.S. 153 (1976) .....*passim*
Hicks v. Oklahoma, 447 U.S. 343 (1980) 27, 47
Huffman v. United States, 297 F.2d 754 (5th Cir. 1962) 16
In re Winship, 397 U.S. 358 (1970) 47
Irvin v. Dowd, 366 U.S. 717 (1961) 12, 25

TABLE OF AUTHORITIES—Continued

Page

Jenkins v. United States, 380 U.S. 445 (1965) 9, 14, 24
Jones v. Norvell, 472 F.2d 1185 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973) 22, 24
Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975) 43
Jurek v. Texas, 428 U.S. 262 (1976) 42, 43
Kelley v. State, 51 Wis. 2d 641, 187 N.W.2d 810 (1971) 17
Kersey v. State, 525 S.W.2d 139 (Tenn. 1975) 17
Lockett v. Ohio, 438 U.S. 586 (1978) 30, 34
Lockhart v. McCree, 106 S. Ct. 1758 (1986) 19, 33, 48
Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982) 27, 47
Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987) 1, 39
Matthews v. Eldridge, 424 U.S. 319 (1975) 26
McCleskey v. Kemp, 55 U.S.L.W. 4537 (U.S. April 22, 1987) 36
McGautha v. California, 402 U.S. 183 (1971) 12
Moore v. Illinois, 408 U.S. 786 (1972) 40
Nigro v. United States, 4 F.2d 781 (8th Cir. 1925) 20
Parker v. Gladden, 385 U.S. 363 (1966) 12, 23
Patten v. State, 467 So. 2d 975 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985) 18
People v. Carter, 68 Cal. 2d 810, 442 P.2d 353, 69 Cal. Rptr. 297 (1968) 20
People v. Gainer, 19 Cal. 3d 835, 566 P.2d 977, 139 Cal. Rptr. 861 (1977) 17
People v. Prim, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), *cert. denied*, 412 U.S. 918 (1973) 17
People v. Santiago, 108 Ill. App. 3d 787, 439 N.E. 2d 984 (Ill. App. Ct. 1982) 20
People v. Sullivan, 392 Mich. 324, 220 N.W.2d 441 (1974) 17
People v. White, 285 A.2d 832 (Maine 1972) 17
Potter v. United States, 691 F.2d 1275 (8th Cir. 1982) 19
Presnell v. Georgia, 439 U.S. 14 (1978) 47
Pugliano v. United States, 348 F.2d 902 (1st Cir.), *cert. denied*, 382 U.S. 939 (1965) 19

TABLE OF AUTHORITIES—Continued

	Page
Pulley v. Harris, 465 U.S. 37 (1984)	36
Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977)	35
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976)	35, 41, 49
Rose v. State, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983)	29
Rush v. State, 491 A.2d 439 (Del. 1985)	18, 23, 29
Sandstrom v. Montana, 442 U.S. 510 (1979)	21
Scoleri v. Pennsylvania, 408 U.S. 934 (1972)	40
Sheppard v. Maxwell, 384 U.S. 333 (1966)	25
Skipper v. South Carolina, 106 S. Ct. 1669 (1986)	12, 26, 43
Sparf v. United States, 156 U.S. 51 (1895)	48
State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978)	17
State v. Aragon, 89 N.M. 91, 547 P.2d 574 (N.M. Ct. App.), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976)	22
State v. Clark, 387 So. 2d 1124 (La. 1980), *cert. denied*, 449 U.S. 1103 (1981)	48
State v. Czachor, 82 N.J. 392, 413 A.2d 593 (1980)	17
State v. Ferguson, 84 S.D. 605, 175 N.W.2d 57 (1970)	17, 20
State v. Garza, 185 Neb. 445, 176 N.W.2d 664 (1970)	17
State v. Knighton, 436 So. 2d 1141 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984)	48
State v. Lowenfield, 495 So. 2d 1245 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986)	8, 34
State v. Loyd, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987)	19, 38
State v. Nicholson, 315 So. 2d 639 (La. 1975)	17
State v. Payton, 361 So. 2d 866 (La. 1978)	42
State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987)	18, 29
State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960)	17
State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959)	17

TABLE OF AUTHORITIES—Continued

	Page
State v. Welcome, 458 So. 2d 1235 (La. 1983), *cert. denied*, 470 U.S. 1088 (1985)	38
State v. Williams, 392 So. 2d 619 (La. 1980)	48
Sumner v. Shuman, 55 U.S.L.W. 4931 (U.S. June 22, 1987)	12, 35, 40
Taylor v. People, 176 Colo. 316, 490 P.2d 292 (1971)	17
Taylor v. State, 17 Md. App.-41, 299 A.2d 841 (Md. Ct. Spec. App. 1973)	22
Tigner v. Texas, 310 U.S. 141 (1940)	46
Turner v. Louisiana, 379 U.S. 466 (1965)	12, 25
United States v. Angiulo, 485 F.2d 37 (1st Cir. 1973)	19
United States v. Bass, 490 F.2d 846 (5th Cir. 1974)	22
United States v. Blandin, 784 F.2d 1048 (10th Cir. 1986)	19
United States v. Brown, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970)	17
United States v. Fioravanti, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969)	16, 17, 18
United States v. Fossler, 597 F.2d 478 (5th Cir. 1979)	22, 24
United States v. Lyons, 731 F.2d 243 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 930 (1984)	22
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)	48
United States v. Rey, 811 F.2d 1453 (11th Cir. 1987)	16
United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984)	20
United States v. Scott, 547 F.2d 334 (6th Cir. 1977)	22
United States v. Seawell, 550 F.2d 1159 (9th Cir. 1977)	24
United States v. Smith, 353 F.2d 166 (4th Cir. 1965)	22
United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971) (*en banc*)	17

TABLE OF AUTHORITIES—Continued

	Page
United States v. United States Gypsum Company, 438 U.S. 422 (1978)	*passim*
Walker v. Jim Dandy Co., 97 F.R.D. 505 (N.D. Ala. 1983), *aff'd in part and rev'd in part on other grounds*, 747 F.2d 1367 (11th Cir. 1984)	49
Williams v. United States, 338 F.2d 530 (D.C. Cir. 1964)	20
Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1984 (1987)	39
Witherspoon v. Illinois, 391 U.S. 510 (1968)	12, 47
Woodson v. North Carolina, 428 U.S. 280 (1976)	12, 30, 48, 49
Zant v. Stephens, 462 U.S. 862 (1983)	*passim*

Statutes

28 U.S.C. § 1254(1)	1
28 U.S.C. § 2254	1
La. Acts 1976, No. 657, *amending* La. Rev. Stat. §§ 14:30 (1950) and 30.1 (Supp. 1973)	41, 42
La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986)	2, 3, 12
La. Code Crim. Proc. Ann. art. 905.3 (West 1984 & Supp. 1986)	32, 38, 46
La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1986)	8, 32, 33, 34
La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986)	3, 13, 27
La. Rev. Stat. Ann. § 14:30 (West 1974)	41
La. Rev. Stat. Ann. § 14:30A(3) (West 1986)	32, 33
Tex. Crim. Proc. Code Ann. § 37.071b(2) (Vernon Supp. 1975-1976)	42
Texas Penal Code Ann. § 12.31(b) (Vernon 1974)	44

Miscellaneous

American Bar Association Project on Minimum Standards for Criminal Justice, *Trial by Jury* 133-34 (approved draft 1968)	17

TABLE OF AUTHORITIES—Continued

Page

S. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1956) 18

Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas and Louisiana*, 24 Loy. L. Rev. 709 (1978) 42

C. Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 Tul. L. Rev. 828 (1979) 42

P. Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused?* 43 Mo. L. Rev. 613 (1978) 17

Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386 (1964) 18

Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123 (1967) 17, 25

Note, *The Work of the Louisiana Legislature for the 1976 Regular Session—A Student Symposium*, 37 La. L. Rev. 89 (1976) 42

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, reported at 817 F.2d 285 (5th Cir. 1987), is reprinted in the Joint Appendix at 100.

The unreported memorandum decision of the United States District Court for the Eastern District of Louisiana (Beer, D.J.) is reprinted in the Joint Appendix at 66.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § 2254, the petitioner brought this *habeas corpus* petition in the Eastern District of Louisiana. On March 31, 1987, the Eastern District denied petitioner's request for relief and his application for a certificate of probable cause.

On May 11, 1987, the United States Court of Appeals for the Fifth Circuit denied petitioner's application for a certificate of probable cause to appeal and a stay of his execution.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254(1). The writ of certiorari was granted on June 22, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner relies on the Eighth Amendment to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioner relies on the Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impar-

> tial jury . . . , and to have the Assistance of Counsel for his defense.

Petitioner also relies on Section 1 of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner further relies on Article 14:30 of the La. Rev. Stat. Ann. which defines first degree murder as:

> the killing of a human being . . . when the offender has a specific intent to kill or inflict great bodily harm on more than one person. . . .

Petitioner also relies on provisions of the Louisiana capital sentencing statute, La. Code Proc. Ann. art. 905 (West 1984 & Supp. 1986) which is reproduced in an appendix to this brief.

STATEMENT OF THE CASE

On May 15, 1984, a jury in the 24th Judicial District, Jefferson Parish, Louisiana, found petitioner guilty of three counts of first degree murder. Petitioner was found to have murdered Sheila Thomas, a woman with whom he had lived and had recently broken up, and two members of her family. He also was convicted of manslaughter for the deaths of another male friend of Thomas' and her child by that friend. All the victims were found at the same time and at the same location. There were no eyewitnesses to the crime.

The jury deliberated for a total of thirteen hours before returning its verdict, including eight hours into the evening, on May 14th and for another five hours, into mid-

afternoon, on May 15th. (Joint Appendix submitted herewith, hereinafter referred to as "J.A.", 3-6).

After announcement of the guilt verdict, petitioner moved for a twenty-four to forty-eight hour hiatus so counsel could prepare for the penalty phase and the "jury [could] cool from the verdict."[1] (J.A. 28). The State objected and urged the court "to proceed within an hour." *Id.* At 3:05 p.m. on the same day—after the jurors had already been sitting for five hours on that day and deliberating a total of thirteen hours over the course of two days—the court denied petitioner's motion and noted his objection. *Id.* The court said that it had spoken to the jurors and "that they felt okay physically, mentally and that they didn't need time to rest." *Id.*

By 6:05 p.m., the court commenced the penalty phase. (J.A. 6). By 8:10 p.m., the penalty hearing had concluded, and the court delivered sentencing instructions. (J.A. 7, 43-46). Later that evening, after the jury had already spent ten hours in court, the jury began deliberating over whether to sentence petitioner to death. (J.A. 7).

Under Article 905.6 and 905.8 of the Louisiana Code of Criminal Procedure, the death penalty can be imposed only if the jury is unanimous in recommending death. Absent unanimity, the court must impose a maximum sentence of life imprisonment without parole.[2] Thus, the court instructed the jury:

---

[1] La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986) provides, "following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearng. . . ."

[2] La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986) provides, "[t]he court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

> The Court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the Court shall impose a sentence of life imprisonment without benefit of probation, parole, or suspension of sentence.

(J.A. 46).

The court delivered the first of two modified *Allen* charges: [3]

> When you enter the jury room it is your duty to consult with one another and to consider each other's views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment (sic). Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to re-exam[ine] your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

(J.A. 46).

At 11:30 that same evening, after the jury had sat for thirteen hours and fifty minutes that day, including five hours and twenty-five minutes on the penalty phase deliberations, the foreman sent the court two questions: (1) whether the jury's recommendation is binding on the judge, to which the judge gave an affirmative response; and (2) "if an unanimous decision on either verdict cannot be reached is the defendant automatically sentenced to life imprisonment?" (J.A. 47). The court responded by again explaining that unless the

---

[3] The "*Allen*" charge owes its name to *Allen v. United States*, 164 U.S. 492 (1896). It refers to supplemental instructions urging the jury to forego their differences and come to a unanimous decision.

jury rendered a unanimous verdict, "[t]he defendant is automatically sentenced to life imprisonment without the benefit of pardon, parole, or suspension of sentence. The answer to the second one is yes." *Id.*

At 11:55 p.m. the jury foreman requested that the jury be allowed to retire for the night. Although the hour approached midnight and the jury had been in court for the past thirteen and a half hours, the court persisted in pressing the jurors as to whether "there [is] any way you could continue deliberating tonight and arrive at a verdict?" (J.A. 48). The foreman responded:

> I think what's happening, Your Honor, is the jury is tired. We've come up with one verdict. We haven't eaten since noon by our own choice and the group is getting quite tired. I just—we as a unit felt that we could better continue after resting.

(J.A. 48). The court told the jury that they would resume the next "morning at nine-thirty." *Id.* By that time, the jury had been in court on May 15 for close to fourteen hours.

At 9:40 a.m., on the following morning, the jury resumed its deliberations. (J.A. 8). Several hours later, petitioner made the first of three unsuccessful oral motions for a mistrial based on the coercive nature of the penalty phase. *Id.* He relied on the length of deliberations, which by then included more than five hours in the sentencing phase, following thirteen hours at the guilt phase. (J.A. 50). He also argued that the court's final instruction at the guilt phase had a residual effect at the sentencing phase. The court denied these motions. (J.A. 51).

Several hours later, petitioner made two more motions for a mistrial: one based on his own observation "that the jury is hopelessly hung," (J.A. 51-52), and a second based on a note from the jury informing the court that they were deadlocked. (J.A. 52). The note stated that

> [t]he jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath it took. (signed) [The Foreman]

(J.A. 17).

The court denied the motion. (J.A. 53). At that point, the court called in the jury and in their presence inquired of the foreman whether the jury had reached "a verdict on any Count." *Id.* The foreman replied that it had not. *Id.*

Instead of finding the jury deadlocked under article 905.8, the court asked each individual juror to indicate on a signed slip of paper his or her answer to the following question: "if further deliberations would be helpful in obtaining a verdict". (J.A. 54). Four jurors indicated that "further deliberations would be of [no] . . . value." (J.A. 17, 54). This response, similarly, did not persuade the court to apply article 905.8 by imposing a life sentence.

Based on the responses, petitioner then remade his motion. (J.A. 54). The court denied the motion, as well as defense counsel's "special request that the Court specifically state to the jury that there is no obligation under the Law that they reach a verdict." (J.A. 55). The court, without comment, denied this request. *Id.*

A half hour after the first poll, the foreman again sent a note to the court indicating that some jurors were confused and requesting that the court poll the jurors again. (J.A. 9, 17). The court, having called the jurors into the courtroom, again polled the jury by asking each individual juror to put his or her name on a slip of paper and state whether the juror "feel[s] that any further deliberations will enable you to arrive at a verdict?" (J.A. 55). After the second poll, the tally was eleven

in favor of further deliberations and one opposed.[4] (J.A. 18, 56). The result of this second poll also failed to influence the court to trigger the application of article 905.8 even though the court advised the jury that if it was unable to agree unanimously on a recommendation the court was required to impose a life sentence. (J.A. 56).

Further emphasizing the court's refusal to accept a less than unanimous verdict, which would have required a life sentence, the court followed the second poll and admonition with a repetition of the modified *Allen* charge. The court instructed the jury that:

> [w]hen you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.
>
> Ladies and Gentlemen please retire to the jury room. (J.A. 56).

---

[4] Specifically, the judge stated:

> I'm going to ask the question again. I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.
>
> The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> I'll repeat that: Do you feel that further deliberations will enable you to arrive at a verdict?
>
> Please put your name and yes or no.

(J.A. 55).

Approximately thirty minutes after the jury was polled for the second time, received the second *Allen* charge and was again reminded that only unanimity would result in a death sentence, the jury returned a verdict recommending death on all three counts. (J.A. 79). By the time it rendered its verdict, the jury had deliberated thirteen hours in the guilt phase and ten hours and eighteen minutes in the penalty phase for a total of over twenty-three hours of deliberations in two days.

The jury found, as to all three murder counts, the aggravating circumstance that petitioner had "knowingly created a risk of death or great bodily harm to more than one person," La. Code Crim. Proc. Ann. art. 905.4(d) (West 1984 & Supp. 1986), and thus sentenced him to death. Petitioner's conviction and sentence were upheld on direct review by the Louisiana Supreme Court. *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986).

SUMMARY OF ARGUMENT

Two fundamental aspects of the sentencer's determination that petitioner should die, each of which provides an independent ground for vacating the sentence, render it so arbitrary and unreliable that it is outside the bounds tolerated by the Eighth Amendment and Due Process. First, the jury was subjected to coercive practices which interfered with its ability to make the requisite individualized judgment of the appropriate punishment, and which impermissibly tipped the scales toward death. Second, due to the complete identity between the crucial element of petitioner's capital crime and the single statutory "aggravating" circumstance found by the jury, the sentencer was not required to make a focused and constitutionally guided sentencing determination that could distinguish the petitioner as uniquely deserving to die.

In order to impose a death sentence, Louisiana's bifurcated capital sentencing scheme requires the jury to

reach a unanimous verdict that a capital defendant who has been found guilty of first degree murder is to die. Under the statute, the jury's failure to reach a unanimous verdict automatically results in a sentence of life without parole. The trial court refused to abide by this statute and impose a life sentence, despite the jury's indication—after more than eight hours of unsuccessful deliberation—that it was "having great distress" and that there was "great unbalance in the voting." The trial court asked the foreman, and then twice required each individual juror to indicate by signing a slip of paper, whether he or she believed further deliberations could lead to a unanimous verdict. This process whittled down those who favored cessation of deliberations, which would have resulted in a life sentence, from four to one.

In forcing further deliberations on the jury towards a unanimous verdict, the court in effect communicated its desire for death, since under the Louisiana statute a non-unanimous decision automatically results in a life sentence. And if that were not enough to tip the scales toward death, the trial court delivered a so-called "blasting charge" urging the jurors not to hesitate to reexamine their opinions in order to reach a "just verdict." Any individualized deliberative judgment which the previously deadlocked jury was trying to reach was impermissibly threatened by this onslaught.

While the "risk" that the death sentence will be arbitrarily imposed is sufficient for reversal, the coercive effect here was confirmed by the jury's swift return of a unanimous verdict recommending death shortly after the blasting charge. Under all the circumstances, the trial judge overstepped the bounds of due process and encroached on the jury's authority and foreclosed a possible nonunanimous outcome. *United States v. United States Gypsum Company*, 438 U.S. 422, 432-33 (1978). *See also Jenkins v. United States*, 380 U.S. 445 (1965).

The Sixth and Eighth Amendments and Due Process require the careful protection of jury sentencing delib-

erations designed to assess the appropriate punishment for each capital offender. The isolation and breakdown of the resistance to death offered by conscientious holdout jurors cannot be tolerated in such a system. This Court has held that jury polling to identify such jurors is grounds for reversal because it serves no useful purpose, has a tendency to be coercive and is an improper influence on the jury. *Brasfield v. United States*, 272 U.S. 448 (1926). When combined with a "blasting charge" urging these jurors to reconsider their views—which a number of courts have held to be reversible error in the non-capital context—the practices are surely unacceptable in light of the need for increased reliability due to the qualitative difference of death from all other punishments. Significantly, the justification for these practices, *i.e.*, the need to avoid unnecessary and costly retrials, evaporates in view of Louisiana's determination that non-unanimity is as acceptable a sentencing verdict as is complete agreement, and no rehearing occurs in either event. *See Gardner v. Florida*, 430 U.S. 349, 365 (1977).

The second ground advanced for vacating the sentence is that the sole aggravating circumstance found by the jury at the sentencing phase was completely identical to a crucial element of the capital crime of which he was convicted. The Louisiana statute permits a jury to impose a sentence of death on a finding of a single statutory aggravating circumstance. Because of the complete overlap, the single "aggravating" circumstance failed to "genuinely narrow" the class of death-eligible persons, and thus failed to provide a rational basis for the sentencer to distinguish petitioner as particularly deserving to die in comparison to others who have committed the same offense. *Zant v. Stephens*, 462 U.S. 862 (1983); *Godfrey v. Georgia*, 446 U.S. 420 (1980). Through the duplication applied to petitioner, the Louisiana capital sentencing scheme did not enforce the primary means this Court has identified for constitutionally limiting and guiding sentencing discretion.

Once having concurred in the identical finding it made at the guilt stage, petitioner's sentencing jury was free to sentence him on the basis of whatever factors it chose. That Louisiana has narrowed its definitions of capital murder does not alleviate the constitutional shortcomings inherent in this unguided scheme. The jury's guilt phase determination was totally devoid of any sentencing considerations. This guilt phase determination was injected into the sentencing phase—without any instruction as to its weight—as the sole check on jury discretion. The uninstructed jury was free merely to echo its guilt phase finding without engaging in a constitutionally mandated individualized deliberative judgment of the appropriateness of sentencing petitioner to death. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Petitioner's sentence was rendered by a jury that—due to the structure and application of the Louisiana capital sentencing statute—never was required to come to terms with the awesome responsibility of its task, as the Eighth Amendment and Due Process mandate.

ARGUMENT

I. The Sentencing Hearing Was Unfair and Coerced a Death Verdict in Violation of Due Process and the Eighth Amendment.

The separate sentencing hearing held in this case violated standards of due process in that under all the circumstances, the jury was subjected to coercive practices which intruded on its fair decision of the issues under deliberation. As we will show, the practices imposed on the jury here have in various combinations, or in some cases individually, been held by this Court as well as other federal courts and state courts to warrant reversal of criminal convictions. Here the barrage of coercive acts creates an overwhelming case of departure from even minimal standards of due process, not to speak of the higher standards imposed in a death case.

The rendering of a death sentence by a coerced jury also violates fundamental Eighth Amendment principles.

Only last term, this Court reaffirmed that a death sentence may not be imposed simply because a defendant is guilty of an offense that has been defined as capital. *Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987). This Court has established as a constitutional requirement that a death sentence may only be imposed by a decision maker who has engaged in a highly individualized assessment designed to assure the appropriate punishment. *See, e.g., Skipper v. South Carolina*, 106 S. Ct. 1669, 1675 (1986) (Powell, J., Burger, C.J., and Rehnquist, J., concurring), *citing Woodson v. North Carolina*, 428 U.S. 280, 304 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Even before the application of the Sixth Amendment protections to the States via the Fourteenth Amendment, *see Duncan v. Louisiana*, 391 U.S. 145, 148-58 (1968), the Court required that where States accorded criminal defendants the right to trial by jury, the jury trial had to be conducted with fairness and impartiality. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961); *Parker v. Gladden*, 385 U.S. 363 (1966) (*per curiam*); *Turner v. Louisiana*, 379 U.S. 466 (1965). Thus, the issue raised here "goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord." 379 U.S. at 471.

Louisiana has entrusted to a jury the "awesome responsibility"[5] of determining who shall live ~~and~~ who shall die. La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986). Moreover, Louisiana has also determined not to permit imposition of the death penalty without a unanimous jury decision. *Id.* This Court has taken great pains to ensure that where a State has entrusted this grave task to a jury, "the decision whether a man deserves to live or die must not be made on scales that are deliberately tipped toward death." *Witherspoon v. Illinois*, 391 U.S. 510, 521 n.20 (1968). Rather, each

[5] *McGautha v. California*, 402 U.S. 183, 208 (1971).

juror's ability to make the "unique individualized judgment regarding the punishment that a particular person deserves," *Caldwell v. Mississippi*, 472 U.S. 320, 340 n.7 (1985) and to do so with reason and calm rather than emotion and caprice, must be carefully guarded. *See also, California v. Brown*, 107 S. Ct. 837, 840 (1987).

Another important determination made by Louisiana is that where the jury is not in unanimous agreement as to the sentence, there is automatically imposed a sentence of life imprisonment without probation, parole, or suspension of sentence. La. Code Crim. Proc. Ann. art. 905.8 (West 1986). Thus, unlike the ordinary criminal trial where the jury's failure to reach a verdict can result in the necessity of a new trial and expenditure of judicial resources, here there is no societal benefit which justifies the use of any practices which tend to coerce juries into reaching unanimity. Here by statute, the vote of even one juror against the death penalty should have produced a result that was as final and definitive as a unanimous verdict for a life sentence. Accordingly, each effort to persuade and cajole the jury to return a unanimous verdict was in effect a message to vote for a death sentence. These particular circumstances magnified the effect of the coercive conduct here, which was highly questionable in any context. Under all of the circumstances this hearing failed to meet the standards for fairness and impartiality required under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A. Under All the Circumstances, the Conduct of the Sentencing Hearing Was Coercive and Unfair.

While a number of the individual practices applied to the jury in this case have been the subject of criticism and held to be grounds for reversal, it is the combination of circumstances, which is unprecedented, that created a shocking atmosphere for coercion and diversion of the jury from their reasoned consideration of the factors

relevant to its life or death determination. In analogous situations, this Court has looked to "all the circumstances" to determine whether the standards of fairness and impartiality have been met. *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (holding "coercive" under all the circumstances trial judge's telling jurors who reported a disagreement that "[y]ou have got to reach a decision in this case"). A framework for such analysis is suggested by Chief Justice Burger's opinion in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), where the court concluded from all the circumstances that the trial judge had "encroach[ed] on [the] jury['s] authority" and "foreclosed a 'possible "no verdict" ' " outcome, 438 U.S. at 459, *quoting opinion below*, 550 F.2d 115, 134 (3d Cir. 1977).

The Court in *Gypsum* first considered the "background of internal pressures and apparent disagreements and confusion among the jurors." 438 U.S. at 460. Each of these descriptive terms is applicable here where after more than eight hours of deliberation the jury reported itself to be "in great distress," "unable to reach a decision," in "great unbalance," and in need of direction as to its responsibilities. (J.A. 17). The jurors here also reported, after being polled, that they were confused as to the judge's question. *Id.*

In *Gypsum*, this Court next focused on the trial judge's communication with the foreman, which in that case was *ex parte*. The important analogous circumstance is that the judge gave the impression that he "wanted a verdict." 438 U.S. at 460. Since the jury here had been told that the lack of unanimity would result in an automatic life sentence, the trial judge's questioning of the foreman regarding further deliberations was a first step in a course of conduct which conveyed a clear message to the jurors that he wanted a unanimous verdict.

Following the interchange with the foreman in the hearing here, (J.A. 54), the trial judge undertook to poll the jury, a practice condemned as improper and

coercive by this Court in *Brasfield v. United States*, 272 U.S. 448 (1926). In that case, the judge had asked the foreman how the jury was divided numerically, and was told that it stood nine to three, but not which side favored conviction. In reversing the conviction, Justice Stone, writing for the Court, depicted the vice of this practice:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450.

Here, there were two pollings (J.A. 54-55) which in effect required the jury "to reveal the nature or extent of its division," and therefore had the same "tendency [to be] coercive" and to exert the "improper influence" on the jury that *Brasfield* condemns. Since the jurors knew that the Louisiana statute provided for a deadlock in the event of a jury disagreement, they also must have realized that opposing further deliberations was tantamount to communicating to the Court that they favored life imprisonment which would result automatically from cessation of the proceedings. Thus, it is reasonable to conclude that the four jurors isolated by the first poll as being opposed to further deliberations were also re-

vealing their opposition to recommending the death penalty.

The improper influence and coercion found in *Brasfield* were exacerbated here by the second polling. By slightly rephrasing the question, the trial judge in effect communicated his view that he was not pleased with the four holdouts and that he favored a unanimous verdict and the death penalty. The consequence of this action was to whittle down from four to one the minority who apparently favored terminating deliberations, which would have automatically resulted in a life sentence. Again the judge had an opportunity to proceed in accordance with the Louisiana Criminal Code by declaring that the jury's disagreement required imposition of a life sentence. But the court again refused to accept the deadlock and instead delivered, for the second time, a modified version of the *Allen* charge which urged the jurors to return a unanimous and "just" verdict. (J.A. 56). At this point, the pressure that the court's action put on the lone holdout must have been enormous.

In *Gypsum*, as here, the repetition of a modified *Allen* charge was a factor considered by this Court in concluding that the circumstances were akin to *Jenkins* where the court impermissibly communicated to the jury its view that it had to reach a verdict. 438 U.S. at 462. Since the approval of the *Allen* charge by this Court almost a century ago, *Allen v. United States*, 164 U.S. 492 (1896), the practice has been subject to severe criticism as being coercive and intruding on the independent function of the jury.[6] For this reason three

---

[6] *See United States v. Rey*, 811 F.2d 1453, 1459 (11th Cir. 1987) (regardless of the specific wording of the charge, "[p]ractically, the pressure to change position will fall most heavily on the minority" (emphasis omitted)); *Huffman v. United States*, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting) (*Allen* charge is "an interference with [the] rightful independence" of the jury); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969) (*Allen* charge "departs from the sole legitimate purpose of a jury to bring back a verdict based on the

federal circuits[7] and a number of states[8] banned the charge in the form used in *Allen*. In reaction to the criticism, an American Bar Association committee crafted a modified version of the *Allen* charge with language changes designed to balance the admonition to reach agreement and to ameliorate the direct pressure on the minority to conform to the majority's views.[9] Nevertheless, the practice is still regarded as having coercive and undesirable effects which are tolerated only because of the countervailing policy of avoiding retrials of criminal cases and the desirable goal of achieving finality in judicial proceedings.[10] In this death sentence proceeding,

---

law and the evidence received in open court"); P. Marcus, *The Allen Instruction in Criminal Cases: Is the Dynamite Charge About to Be Permanently Defused?* 43 Mo. L. Rev. 613, 624-37 (1978); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 136-149 (1967).

[7] *See United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (*en banc*); *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States v. Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970).

[8] *See Fields v. State*, 487 P.2d 831 (Alaska 1971); *State v. Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959); *People v. Gainer*, 19 Cal. 3d 835, 566 P.2d 977, 139 Cal. Rptr. 861 (1977); *Taylor v. People*, 176 Colo. 316, 490 P.2d 292 (1971); *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), *cert. denied*, 412 U.S. 918 (1973); *State v. Nicholson*, 315 So. 2d 639 (La. 1975); *People v. White*, 285 A.2d 832 (Maine 1972); *People v. Sullivan*, 392 Mich. 324, 220 N.W.2d 441 (1974); *State v. Randall*, 137 Mont. 534, 353 P.2d 1054 (1960); *State v. Garza*, 185 Neb. 445, 176 N.W.2d 664, 666 (1970); *Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972); *State v. Czachor*, 82 N.J. 392, 413 A.2d 593 (1980); *State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978); *Commonwealth v. Spencer*, 442 Pa. 328, 275 A.2d 299 (1971); *State v. Ferguson*, 84 S.D. 605, 175 N.W.2d 57 (1970); *Kersey v. State*, 525 S.W.2d 139 (Tenn. 1975); *Kelley v. State*, 51 Wis. 2d 641, 187 N.W.2d 810 (1971).

[9] *See* American Bar Association Project on Minimum Standards for Criminal Justice, *Trial by Jury* 133-34 (approved draft 1968).

[10] *See, e.g., State v. Alston*, 294 N.C. 577, 243 S.E.2d 354, 365 (1978); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 123-27 (1967).

however, there is no such counterbalancing rationale for intruding on the jury's function in view of the Louisiana statute which provides for an automatic sentence of life without parole if the jury is not unanimous. Since a non-unanimous jury here would not have required any retrial of the sentencing issues, the direction to the jury to attempt to reach a unanimous verdict stands nakedly coercive without any justification other than to "tip the scales towards death." [11]

Based on this reasoning, the highest courts of three states have reversed death sentences where—as here—the trial judge urged a verdict upon a jury whose failure to agree would have resulted in an automatic life sentence under state law. *Rush v. State*, 491 A.2d 439 (Del. 1985) (where "lack of unanimity *per se* results in a sentence of life imprisonment, such [a verdict-urging] instruction is fatal as being overly coercive"); *Patten v. State*, 467 So. 2d 975 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 285 (1987).

Moreover, the verdict-urging charge has been recognized as particularly coercive where it is used not merely in the main instructions but as a " 'dynamite charge' to blast a deadlocked jury into a verdict." *United States v. Fioravanti*, 412 F.2d 407, 419 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).[12] In contrast to the situation at

---

[11] There is scientific support for the view that there is pressure on minority jurors to conform their views to those of the majority. S. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 Psychological Monographs: General and Applied 1 (1956). Such pressures are magnified by a "blasting charge" since "[a] minority member might well take the charge as an invitation to allow the majority to rule." Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386, 389 (1964).

[12] Jury instructions designed to move deadlocked jurors toward a verdict have been variously referred to by courts as "blasting" charges, "dynamite" charges, "third degree" instructions and "shotgun" instructions. *United States v. Fioravanti*, 412 F.2d 407, 419 & n.29 (3d Cir. 1969), *cert. denied*, 396 U.S. 837 (1969).

the time of the initial instructions where there is no identifiable minority subject to pressure, after the announcement of a deadlock—particularly where, as here, the judge knows what the vote is and the jurors have signed notes indicating their minority or majority position—the charge takes on a more ominous meaning to the holdouts. *Potter v. United States*, 691 F.2d 1275, 1276 n.1 (8th Cir. 1982). For this reason, the Tenth Circuit has ruled that "[i]f the *Allen* instruction is given at all, it should be incorporated into the body of the Court's original instructions to the jury. It should not be given during the course of deliberations." *United States v. Blandin*, 784 F.2d 1048, 1050 (10th Cir. 1986) (citation omitted); *see also Fioravanti*, 412 F.2d at 419.

The variation of the *Allen* charge given here also interfered with the burden of proving aggravating circumstances beyond a reasonable doubt which Louisiana imposes on the State in death sentence hearings.[13] The jury charge approved by this court in *Allen* contained a reminder of the government's burden of proof. Based on this historical precedent and because absent such a proviso, "the charge might move some jurors to forget the prosecution's heavy burden of proof," *United States v. Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973), the First and the Eighth Circuits have required inclusion of the burden of proof reminder, which was in the form of charge this Court approved in *Allen*. *Potter v. United States*, 691 F.2d 1275, 1278 (8th Cir. 1982); *Pugliano v. United States*, 348 F.2d 902, 903-04 (1st Cir.), *cert. denied*, 382 U.S. 939 (1965). Accordingly, the blasting charge

---

[13] The jury in a Louisiana capital sentencing proceeding must find defendant guilty of at least one aggravating circumstance "beyond a reasonable doubt." *State v. Loyd*, 489 So. 2d 898, 901 (La. 1986), *cert. denied*, 107 S.Ct. 1984 (1987). Even beyond this, petitioner's counsel properly urged the jury to consider any lingering doubts as to petitioner's guilt, especially given the length of the jury's deliberations in the guilt phase. *See generally Lockhart v. McCree*, 106 S. Ct. 1758, 1768-69 (1986) (adverting to "residual doubts" as "effective" mitigating argument).

given here subordinated the State's burden of proof beyond a reasonable doubt to a non-existent need for a unanimous verdict.

The most pernicious aspect of the *Allen*-type charge given here, which under similar circumstances has led many federal and state courts to find it unacceptably coercive, is its juxtaposition with the polling of the jury and isolation of the minority jurors as its target. In that context, the admonition to reach agreement is boldly directed at the minority jurors. As a result, all of the coercive effects, which the modern language modifications sought to ameliorate, come to the fore. The Ninth Circuit's description of strikingly similar circumstances, which led it to reverse a conviction, is apt:

> Under these circumstances the charge could only be read by the dissenting juror as being leveled at him. He could hardly escape reasoning that . . . he, individually, was being urged by the judge to reconsider his vote.

United States v. Sae-Chua, 725 F.2d 530, 532 (9th Cir. 1984) (citations omitted). *Accord*, *Cornell v. Iowa*, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981) ("the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors"); *Williams v. United States*, 338 F.2d 530, 531 (D.C. Cir. 1964) (reversal where *Allen* charge followed query to jury foreman as to whether there was an even division); *Nigro v. United States*, 4 F.2d 781, 785 (8th Cir. 1925) (same); *People v. Santiago*, 108 Ill. App. 3d 787, 439 N.E.2d 984 (Ill. App. Ct. 1982); *People v. Carter*, 68 Cal. 2d 810, 816, 442 P.2d 353, 357, 69 Cal. Rptr. 297, 301 (1968); *State v. Ferguson*, 175 N.W.2d 57 (S.D. 1970).[14]

---

[14] In determining whether the presence or absence of particular procedures—such as the blasting charge and jury polling—offends

The widespread condemnation of delivering an *Allen*-type charge after a jury poll indicating the existence of a split and worse still, as here, after identification of the minority, weighs as a strong factor in assessing whether the totality of the circumstances here violated the standards of due process. The lone dissenter, after hearing the foreman questioned in open court, and after two pollings in which he had to reveal his identity by signing a paper indicating his position, could not have helped but feel that the final verdict-urging charge was directed towards pressuring him personally to relinquish his view.

The final factor in the analysis of the likely coercive effect of the conduct of the sentencing hearing is the relative brevity of the time in which the hold-out juror relented after the blasting charge and other actions of the court. Here, the jury reported its "great distress" and "great unbalance" in the second day of deliberations on the sentencing phase after a total of five hours. (J.A. 8). Then, during the course of the next hour or so, the jury reiterated its deadlock no less than three times. (J.A. 53-56). Yet, half an hour after the blasting charge, the jury suddenly returned a unanimous verdict for the death sentence. The importance of this circumstance was also reflected in this Court's opinion in *Gypsum*, where the jury returned a verdict the morning after the repetition of the modified *Allen* charge and

---

the Due Process Clause, this court has traditionally relied on the views expressed by the state courts and lower federal courts to determine whether the Constitution's fundamental fairness standard has been met. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 514 & n.3 (1979) (federal and state court holdings cited as evidence of unconstitutionality of jury instruction that defendant is presumed to intend ordinary consequences of his voluntary acts); *Beck v. Alabama*, 447 U.S. 625, 637 (1980) ("While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard").

communication with the foreman. As Chief Justice Burger explained:

> this swift resolution of the issues in the face of positive prior indications of hopeless deadlock, at the very least, gives rise to serious questions in this regard.

438 U.S. at 462. *Accord*: *Jones v. Norvell*, 472 F.2d 1185 (6th Cir.), *cert. denied*, 411 U.S. 986 (1973) (*Brasfield* polling, *Allen* charge and "the speedy return of a verdict subsequent to the charge" held ground for reversal of state court conviction on *habeas* petition); *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974), *overruled in part on other grounds*, *United States v. Lyons*, 731 F.2d 243, 246 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 930 (1984) (reversing conviction where jury returned verdict in less than an hour after ordered to continue deliberations); *United States v. Smith*, 353 F.2d 166 (4th Cir. 1965) (reversing conviction where jury returned verdict 40 minutes after *Allen* charge); *United States v. Fossler*, 597 F.2d 478 (5th Cir. 1979) (one hour after second *Allen* charge); *Taylor v. State*, 17 Md. App. 41, 299 A.2d 841 (Md. Ct. Spec. App. 1973) (verdict twenty minutes after polling and remark suggesting that holdout should give in); *State v. Aragon*, 89 N.M. 91, 547 P.2d 574 (N.M. Ct. App.), *cert. denied*, 89 N.M. 206, 549 P.2d 284 (1976) (verdict twenty minutes after two polls and *Allen* charge given after three-and-a-half hours of deliberation); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) ("prejudicial impact" of *Allen* charge "dramatically illustrated when the jury, which had spent eight and one-half hours of fruitless deliberations, achieved unanimity in only fourteen minutes after its delivery").[15]

---

[15] In contrast to the above circumstances which make quite clear the court's message, in most cases where this Court and others have reversed convictions the coercive intent and effect was not so readily apparent and a mere tendency to coerce or intrude on the jury was held sufficiently improper. Thus, in *Gypsum*, 438 U.S. 422,

Moreover, in light of the Louisiana statutory provision requiring a life sentence if the jury is nonunanimous, about which the jury was repeatedly instructed, the trial court's refusal to accept the jury's three expressions of disagreement and its instruction to try to reach a unanimous and "just" verdict, was in effect a message that the Court was urging the death sentence. *See Rush v. State*, 491 A.2d at 453-54. If the trial court was properly neutral, it would have made it clear to the jury that a disagreement, which would have resulted in a sentence of life without parole, was equally as "just" and acceptable as a unanimous verdict, which was statutorily required for death. Surely, the dissenting jurors, who were required to sign their names to indicate that they did not favor further deliberations, understood in the face of the statutory results of their position that they were announcing

---

Chief Justice Burger recognized that "it is, of course, impossible to gauge what part the disputed meeting played in the jury's action of returning a verdict the following morning," but nevertheless set aside the conviction "solely because of the risk that the foreman believed the Court was insisting on a dispositive verdict; a belief which we must assume was promptly conveyed to the jurors." 438 U.S. at 462. Here there is no question that the court directly conveyed to the jurors by its actions and words its desire for a death verdict, even though a "dispositive" result could have been achieved by accepting the jury's repeated expressions of disagreement. *See also Parker v. Gladden*, 385 U.S. 363, 365 (1966) (*per curiam*) (reversing a State murder conviction for violation of the Sixth Amendment, as incorporated in the Fourteenth, based on unauthorized remarks by a bailiff to the jury, where the conduct "involves such a probability that prejudice will result that it is deemed inherently lacking in due process"); *Brasfield*, 272 U.S. at 450 (setting aside the conviction based on jury polling if "in general its tendency is coercive" and "is generally harmful").

This Court's capital punishment decisions have also been sensitive to the risks of unreliability inherent in certain practices rather than insisting on proof of actual coercive effects. Thus, the Court has stated that a procedure must not "create the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Booth v. Maryland*, 55 U.S.L.W. 4836, 4837 (U.S. June 15, 1987), *quoting Zant v. Stephens*, 462 U.S. 862, 885 (1983).

in favor of life. And the court's refusal to invoke that statutory result, the subsequent pollings and the verdict-urging instruction signaled its intention that the jury deliberate further, which could only have been interpreted as for the purpose of achieving a unanimous verdict of death.

Under all of the circumstances, the conduct of the sentencing hearing had a "coercive effect." *Jenkins v. United States*, 380 U.S. 445, 446 (1965). As this Court concluded in *Gypsum*, "the logic of *Jenkins* cannot be said to be inapposite here, given the peculiar circumstances." 438 U.S. at 462. What occurred here is equivalent to "directing the jury that it *had* to reach a verdict." *Id.*

Under similar circumstances federal courts have consistently held that due process has been violated requiring reversal of state court conviction, *Jones v. Norvell*, 472 F.2d 1185 (6th Cir. 1973), and that the coercive effect warranted reversal of federal convictions, *e.g.*, *United States v. United States Gypsum Company*, 438 U.S. 422 (1978); *Brasfield v. United States*, 272 U.S. 448 (1926); *United States v. Fossler*, 597 F.2d 478 (5th Cir. 1979); *United States v. Seawell*, 550 F.2d 1159 (9th Cir. 1977). These cases are compelling support for holding that the conduct of the sentencing hearing intruded on the jury's individualized decision making process and coerced the minority jurors into a unanimous death verdict in contravention of the Due Process Clause and the Eighth Amendment.

B. Judicial Coercion of the Sentencing Jury Deprived Petitioner of Due Process.

Where, as in Louisiana, the legislature has accorded capital sentencing responsibility to the jury, this Court's precedents require that the sentencing phase jury be permitted to deliberate in a fair and impartial manner. Even before this Court's holding in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the Sixth Amendment right to

jury trial applies to the States, the Court insisted on so much. The Court in such cases addressed the issue posed here of "the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord." *Turner v. Louisiana*, 379 U.S. 466 (1965). In articulating "the constitutional concept of trial by jury," the Court specified that "[e]xercise of calm and informed judgment by its members is essential to proper enforcement of law." 379 U.S. at 472. The Court quoted Mr. Justice Holmes' observation that "[a]ny judge who has sat with juries knows that . . . they are extremely likely to be impregnated by the environing atmosphere." *Id.* Here the environing atmosphere during the final hours of jury confusion, disagreement, polling and the urging of a unanimous verdict was bent in favor of the death penalty and intruded on the jury's exercise of independent judgment.

The right to an impartial jury free of improper influence was also the premise for finding a violation of due process that required overturning a State death sentence conviction in *Irvin v. Dowd*, 366 U.S. 717 (1961), in which the Court held:

> [T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . . In the language of Lord Coke, a juror must be as "indifferent as he stands unsworn. . . . His verdict must be based upon the evidence developed at the trial."

366 U.S. 722 (citations omitted). *See also Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532, 545 (1965); Note, *Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123, 138 (1967) ("[W]here the jury is the chosen instrument of decision, the Supreme Court has insisted upon strict standards designed to preserve the jury's impartiality"). Since where the

State accords the right to jury trial, the proceedings must be fair and impartial, it follows that practices which are condemned as coercive and intruding on the jury's determination from the evidence alone, must—at least in a capital case—be considered to violate fundamental due process standards. *See Skipper v. South Carolina*, 106 S. Ct. 1669, 1674 (Powell, J., Burger, C.J., and Rehnquist, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

In determining the point at which the requirement of due process of law will be isolated, it is elemental that the interests of society in requiring or denying certain procedures will be balanced against the harm that is caused thereby. *Matthews v. Eldridge*, 424 U.S. 319, 335 (1975) (due process requirements are determined by weighing affected private interests against justification for government actions). *See also Brasfield v. United States*, 272 U.S. 448, 450 (1926), where this Court noted that questioning which reveals the nature or extent of the jury's division "serves no useful purpose." The same analysis has been applied in capital cases to determine whether Eighth Amendment standards have been met. *See Gardner v. Florida*, 430 U.S. 349, 360 (1977) (ordinary purpose of withholding presentence reports from defendants, *i.e.*, for rehabilitation, was not present in a capital case, so that the practice was ground for vacating the death sentence).

In a separate sentencing hearing there is no societal purpose to be achieved by the combination of coercive practices here employed, since the lengthy guilt trial will not be affected. Moreover, in the peculiar circumstances here, where the Louisiana code expressly provided that if the jury was not unanimous a life sentence automatically resulted, there was no purpose whatsoever in applying the slightest coercive practice, no less the repeated and varied efforts here, to bring about unanimity, other than to tip the scales in favor of death.

Moreover, it has been held violative of due process for the trial court to have arbitrarily denied petitioner the

benefit of a state-created procedure, even where it is not so fundamental as the right to a fair and impartial jury trial. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *see Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). This Court in *Hicks* set aside a sentence imposed pursuant to a mandatory sentencing provision of a statute later held unconstitutional by a state court, stating:

> Where . . . a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

447 U.S. at 346.

Here petitioner had a "substantial and legitimate expectation" that he would be deprived of his life "only to the extent determined by the jury in the exercise of its statutory discretion" under La. Code Crim. Proc. Ann. art. 905.8. In addition, where the jury was not unanimous, the State criminal code granted the right to a life sentence without parole. Accordingly it is violative of due process for the Court first to have rejected the jury's repeated expressions that it was not unanimous, which under the statute required imposition of a life sentence, and then to have needlessly interfered with the jury's free exercise of discretion by engaging in coercive polling and instructions.

Petitioner's right to a fair and impartial jury, accorded to him by Louisiana law, was violated by the coercive practices at his sentencing. He was thus denied due process of law.

C. The Sentencing Hearing Violates the Cruel and Unusual Punishment Clause and the Due Process Clause Because It Is Inconsistent With the Principles Established in This Court's Post-*Furman* Capital Punishment Decisions.

For many of the same reasons that the coercive practices at the sentencing hearing violate the standards of due process applicable in all cases, the conduct of that hearing also violates the particular requirements held by this Court to be mandated by the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Where provision is made for a jury determination in a capital sentencing proceeding, the Court has decreed that the "jury must make an '*individualized* determination' of whether the defendant should be executed, based on 'the character of the individual and the circumstances of the crime.'" *Booth v. Maryland*, 55 U.S.L.W. 4836, 4837 (U.S. June 15, 1987), *quoting Zant v. Stephens*, 462 U.S. 862, 879 (1983) (emphasis in original). Nor can the sentencing process create a "constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." *Id.* The death sentence cannot, consistent with Eighth and Fourteenth Amendment requirements, be imposed "based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Booth*, 55 U.S.L.W. at 4837. Plainly, where the jury has been subjected to pressure to return a death verdict, the sentence was not, as constitutionally it "must 'be, and appear to be, based on reason rather than caprice or emotion.'" *Booth*, 55 U.S.L.W. at 4839, *quoting Gardner v. Florida*, 430 U.S. 349, 358 (1977). *See* discussion in Argument, Section I, *supra* at pp. 24-25.

The conduct described here also is inconsistent with the Eighth Amendment's prerequisites to a valid death sentence recently announced in *California v. Brown*, 107 S. Ct. 837, 839 (1987), where the Court refused to disapprove a jury instruction not to be swayed by senti-

ment, conjecture, or public feeling. As Chief Justice Rehnquist for the Court explained, the charge could be interpreted to accord with the requirement that the jury must "ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." 107 S. Ct. at 840. Plainly, the isolation of jurors who are asked to sign their names to slips of paper indicating that they are the holdouts, followed by a blasting charge and the other circumstances here, introduced "extraneous emotional factors," *id.* at 840, that undermined the fundamental protection against administering the death penalty "in an arbitrary and unpredictable fashion." *Id.* at 839.

While Louisiana insists that it is proper to permit a court to urge a unanimous verdict upon a jury whose inability to agree results by statute in an automatic life sentence, in contrast, the highest courts of Florida, Delaware and New Jersey have held it to be coercive and without legitimate purpose to press the jury to strive toward unanimity in the face of such a statutory requirement. *Rush v. State*, 491 A.2d 439 (Del. 1985); *Rose v. State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983); *State v. Ramseur*, 106 N.J. 123, 524 A.2d 188, 285 (1987). The awesome consequence of intervening in a deliberation of life or death influenced these courts in holding such coercion to be "fatal". *Rush*, 491 A.2d at 453. *See Caldwell v. Mississippi*, 472 U.S. 320, 333-34 & nn.4 & 5 (1985) (citing state court opinions as support for holding death sentence unconstitutional where prosecutor told jury that final determination of capital defendant's fate lay in hands of appellate court and not in theirs).

Because this is a capital case, especially strict scrutiny must be given to any practice tending to coerce the jury by subjecting it to influences other than the law and the evidence adduced at trial. *See, e.g., Beck v. Alabama*, 447 U.S. 625, 637 (1980) (because of the "significant constitutional difference" between death and other punish-

ments, the risk of an unwarranted conviction "cannot be tolerated in a case in which the defendant's life is at stake"); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (because the death penalty "differs dramatically" from any other state action, it is "of vital importance to the defendant and to the community that any decision to impose the death penalty be, and appear to be, based on reason rather than caprice or emotion"); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) ("When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (because of the qualitative difference between capital and non-capital cases, there "is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between life and death calls for a greater degree of reliability when the death sentence is imposed.").

Accordingly, applying the heightened need for reliability, and the criticality of avoiding extraneous and emotional considerations in a death sentence proceeding, the circumstances here—which in their totality could not pass muster in a non-capital case—should be deemed to have violated the Due Process Clause of the Fourteenth Amendment, the Sixth Amendment right to a fair and impartial jury and the Eighth Amendment prerequisites to imposition of a valid death sentence.

II. Petitioner's Death Sentence, Based on a Sole Statutory "Aggravating" Circumstance That Merely Repeats an Element of the Crime, Violates the Eighth Amendment Requirement that Sentencer Discretion Be Directed and Limited So As to Minimize the Risk of Arbitrary and Capricious Executions.

The Louisiana capital sentencing scheme, as applied to petitioner, gave the capital sentencer unbridled discretion to impose the death penalty, in violation of well-settled

Eighth Amendment doctrine. Petitioner is sentenced to die solely on the basis of a jury finding of a single statutory "aggravating" circumstance that is identical to a crucial element of the capital crime for which he was being sentenced. No other aggravating circumstance supports a sentence of death. As a result, the jury was permitted to impose the death sentence by merely confirming its finding of guilt.

The Louisiana statutory "aggravating" circumstance found here did not "genuinely narrow" the class of death-eligible persons. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). By failing to channel and limit juror discretion within permissible bounds through the provision of appropriate legislative standards for selecting who should die among those convicted of murder, the Louisiana statutory scheme, as applied here, suffers from the same infirmity as the discretionary-sentencing statutes invalidated by this Court in *Furman v. Georgia*, 408 U.S. 238 (1972), and is therefore unconstitutional. The Louisiana capital sentencing procedure, as applied here, impermissibly failed to provide a rational basis for distinguishing the cases where the death penalty is imposed from those where it is not for the same offense. *See Furman v. Georgia*, 408 U.S. 238, 313 (White, J., concurring). The application of that scheme also allowed the sentencer to avoid the constitutionally mandated responsibility of engaging in an individualized deliberative process that squarely confronted the "awesome responsibility of decreeing death for a fellow human." *Caldwell v. Mississippi*, 472 U.S. 320, 329-330 (1985), *citing McGautha v. California*, 402 U.S. 183, 208 (1971).

A. The Louisiana Statute Permitted a Sentence of Death To Be Imposed In This Case Based Upon An "Aggravating" Circumstance That Merely Repeats An Element of the Crime.

The Louisiana statute defines five categories of homicide as first-degree murder. One of these categories is the

killing of a human being when the offender has a "specific intent to kill or to inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30A(3) (West 1986).[16] If a person is found guilty of any one of the five categories of homicide set forth in the statute, a new hearing before the same jury is then required to determine the appropriate sentence. In a sentencing hearing, the jury is given the discretion to impose the death penalty if it finds beyond a reasonable doubt the existence of one or more of ten statutorily delineated aggravating circumstances. La. Code Crim. Proc. Ann. art. 905.3 and 905.4 (West 1984 & Supp. 1986).[17]

The jury must also "consider" any mitigating circumstances,[18] although it is not required to enumerate its findings in this regard. La. Code Crim. Proc. Ann. art. 905.3 (West 1984 & Supp. 1986). Nor must the jury weigh or balance the aggravating against the militating factors by any statutory standards. *Id.* So long as a Louisiana jury finds that a single statutory aggravating circumstance exists, as it did here, it can sentence the

---

[16] The remaining classes of first-degree murder in Louisiana are killing in connection with the commission of certain felonies, killing of a fireman or peace officer in the performance of his or her duty, killing for remuneration, and killing an individual under the age of twelve. La. Rev. Stat. Ann. § 14:30A (West 1986).

[17] The Louisiana statute enumerates ten aggravating circumstances, which are delineated in full in the statutory appendix to this brief. Petitioner was sentenced on the basis of the statutory aggravating circumstance which provides:

> (d) the offender knowingly created a risk of death or great bodily harm to more than one person.

La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1986).

[18] The Louisiana Code of Criminal Procedure provides that, "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed." La. Code Crim. Proc. Ann. art. 905.3 (West 1984 & Supp. 1986).

defendant to death, regardless of the presence of any mitigating factors. *Id.*

Here, petitioner was convicted of three counts of first-degree capital murder. (J.A. at 5-6). An essential element of each guilt determination was the jury's finding that petitioner killed with the "specific intent to kill or to inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30A(3) (West 1986). As part of its brief presentation of argument and evidence at the sentencing proceeding, the State simply referred to the evidence it had already presented during the guilt phase and little else.[19] (J.A. at 37-38). The prosecutor plainly told the jury that, to impose the death penalty, it need only find again as an aggravating circumstance the very element it had just determined to exist as part of its guilty verdict. (J.A. at 38).

As it was authorized to do under the Louisiana statute, the jury in the sentencing phase merely echoed the determination it had made at the guilt stage. It found only one aggravating circumstance as to all of the counts of murder: that "the offender knowingly created a risk of death or great bodily harm to more than one person." (J.A. at 57-58). On this basis the jury imposed a sentence of death on petitioner.[20]

---

[19] The only other evidence offered by the State was a ten-year-old Canadian conviction for attempted rape and an indictment against the petitioner for earlier harassment of the principal victim. (J.A. at 37). This evidence did not support the jury's finding of an aggravating circumstance. *See* n.20, *infra*. Petitioner's trial counsel, reminding the jury that they had deliberated in the guilt phase for thirteen hours, urged the jury to permit any lingering doubts to surface in arriving at an appropriate sentence. (J.A. at 39). *See generally Lockhart v. McCree*, 106 S. Ct. 1758, 1768-69 (1986) (adverting to "residual doubts" as "effective" mitigating argument).

[20] While as to one of the three first-degree murder counts the jury found the additional statutory aggravating factor that "the victim was a witness in a prosecution against the defendant," La. Code Crim. Proc. Ann. art. 905.4(h) (West 1984 & Supp. 1986), the

B. The Eighth Amendment Requires that a Sentence of Death Be Based on At Least One Aggravating Circumstance That Genuinely Narrows the Death-Eligible Class From Among Convicted Murderers.

Fifteen years ago in *Furman v. Georgia*, 408 U.S. 238 (1972), this Court held that the Eighth Amendment does not allow a jury to find a defendant's guilt "and then, without guidance or discretion" decide whether he should live or die. *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (plurality opinion). Since *Furman*, this Court's modern capital punishment doctrine has been rooted in the recognition that the qualitative difference of death from all other punishments demands an enhanced need for reliability in capital sentencing determinations. *See, e.g., California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Opinion of Burger, C.J. and Stewart, Powell, & Stevens, JJ.). The Louisiana statute must be evaluated in light of this stringent requirement.

As this Court has recently reaffirmed, one of the fundamental principles that must guide capital sentencing is that:

> sentencers may not be given unbridled discretion in determining the fates of those charged with capital offenses. The Constitution instead requires that death penalty statutes be structured so as to prevent

---

Louisiana Supreme Court, on direct review of petitioner's conviction and sentence, found that the evidence was insufficient, as a matter of state law, to support this finding. *State v. Lowenfield*, 495 So. 2d 1245, 1256 (La. 1985), *cert. denied*, 106 S. Ct. 2259 (1986).

The jury explicitly rejected the State's argument that petitioner had a significant prior history of criminal activity, an aggravating factor on which it was also specifically instructed. (J.A. at 57-58).

The Louisiana Code does not authorize the jury to consider aggravating circumstances that are not expressly listed in the statute. *See* La. Code Crim. Proc. Ann. art. 905.4 (West 1984 & Supp. 1986).

> the penalty from being administered in an arbitrary and unpredictable fashion. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

California v. Brown, 107 S. Ct. 837, 839 (1987).

In applying this constitutional requirement, the Court has, on the one hand, prohibited states from considering any crime—no matter how narrowly defined—so serious that every person who commits it should be put to death. *See Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987) (invalidating statute mandating death for life term prisoners who commit murder); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977) (invalidating statute mandating death for murder of a peace officer); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976) (invalidating statute mandating death for first-degree murders defined in the same manner as they are in the instant case). On the other hand, the Court, mindful of the need to direct and limit the sentencer's discretion, has required capital sentencing statutes to specify aggravating circumstances for the purpose of aiding in the rational selection of who among those convicted of murder should be singled out for the ultimate and irrevocable penalty of death. *Zant v. Stephens*, 462 U.S. 862, 878 (1983) ("aggravating circumstances play a constitutionally necessary function").

In order to satisfy the Court's mandate in *Furman*, such aggravating circumstances

> must be genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, supra at 877 (1983). Thus in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court found Georgia's capital sentencing scheme constitutional on its face,

in large measure because it provided for a "bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." 428 U.S. at 195.[21] These "clear and objective standards," focusing on the specific circumstances of the crime and the character of the offender, are enforced through the requirement that the sentencer "find a *statutory* aggravating circumstance before recommending a sentence of death." 428 U.S. at 197 (emphasis in original). *See also Zant v. Stephens*, 462 U.S. at 876 ("The approval of Georgia's capital sentencing procedure rested primarily on . . . [the requirement] that the jury . . . find at least one valid statutory aggravating circumstance"). A statutory aggravating circumstance "must satisfy a constitutional standard derived from the principles of *Furman* itself" in guiding the sentencer in the selection of whether one convicted of murder should live or die. *Zant v. Stephens, supra* at 876.

---

[21] *See also McCleskey v. Kemp*, 55 U.S.L.W. 4537, 4543 (U.S. April 22, 1987), *quoting Gregg v. Georgia*, 428 U.S. at 196 ("a State must 'narrow the class of murderers subject to capital punishment,' by providing 'specific and detailed' guidance to the sentencer").

The importance of the constitutional requirement of a sentencer finding of a meaningful statutory aggravating circumstance that genuinely narrows the death-eligible class is highlighted by the Court's subsequent holdings that other elements of the Georgia capital sentencing scheme, upheld in *Gregg*, were not constitutionally required. The Court has held that, once jury discretion has been initially checked in this manner, there is no constitutional reason to limit the additional aggravating circumstances a jury may consider. *Barclay v. Florida*, 463 U.S. 939 (1983). The Court has also held that the Eighth Amendment does not require any particular form of capital sentencing review. *Pulley v. Harris*, 465 U.S. 37 (1984). The need for a sentencer finding of a meaningful statutory aggravating circumstance therefore assumes even greater importance as the only significant means for addressing *Furman*'s concerns.

A jury's finding of a statutory aggravating circumstance will not provide sufficient constitutional assurance of the reliabiilty of the sentence, as *Furman* requires, if the aggravating circumstance fails meaningfully to guide and instruct the sentencer by narrowing the death-eligible class from all who are convicted of murder. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the petitioner was sentenced to death on a jury finding of the single aggravating circumstance that the murders were "outrageously or wantonly vile, horrible and inhuman." 446 U.S. at 425-26. The Court found that this statutory aggravating circumstances had been construed so broadly as to apply to virtually every case. *Id.* at 432-33. In particular, the *Godfrey* plurality held that the overly broad statutory aggravating circumstance fostered "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury. . . ." *Id.* at 429.

As the cases discussed above indicate, this Court has consistenly required that meaningful statutory aggravating circumstances are the constitutional touchstone to guide the sentencer in a capital case. Here, because the sole statutory aggravating circumstance for which the petitioner has been singled out to die provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many in which it was not," *id.* at 433 (opinion of Stewart, Blackmun, Powell, and Stevens, JJ.), this requirement is violated and petitioner's death sentence may not stand.

C. The Louisiana Jury Exercized Untrammeled Discretion in Its Sentencing Determination.

The Court's admonition in *Furman* and subsequent cases—establishing that states must first define a class of defendants who are eligible for the death penalty and then provide meaningful standards to guide jury discretion in selecting which individuals within this class should die—is violated by the application of Louisiana's statute to

the petitioner in this case. The sentencing jury was not properly guided in exercising its discretion. Under the Louisiana statutory scheme described in Section II, A, *supra*, the sole aggravating factor on which petitioner's death sentence was ultimately based was identical to the crime which the jury had just found he had committed. Having found in the guilt phase of petitioner's trial that petitioner was guilty of murder because he had intended to inflict death or great bodily harm on more than one person, the jury was told, without any further guidance, that it could impose a sentence of death if it once again made the finding it had just made—that petitioner had intended to inflict death or great bodily harm on more than one person.[22]

The jury was given no basis for selecting petitioner, unlike others convicted of first degree murder in Louisiana, as particularly deserving to die. These deficiencies in the sentencing proceeding were compounded by the freedom the jury had—once it reaffirmed its guilt phase determination—to reach a sentencing decision without even weighing aggravating against mitigating factors.[23] In the circumstances of this case, the sentencing proceeding was a charade, devoid of any "genuine narrowing"

---

[22] Although the jury scarcely needed reminding that it had just made this finding in the guilt phase, the prosecutor nevertheless so reminded it. J.A. at 38.

[23] Once having "considered" mitigating circumstances, pursuant to Article 905.3 of the Louisiana Code of Criminal Procedure, the jury was without any further guidance and could accord mitigating factors little or no significance. There appears to be some degree of confusion on these precise requirements under Louisiana law. *Compare State v. Loyd*, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987) (some amount of jury weighing is implicit in the requirement that a sentencing jury "consider" mitigating circumstances), *with Flowers v. State*, 441 So. 2d 707 (La. 1983), *cert. denied*, 466 U.S. 945 (1984), *citing State v. Welcome*, 458 So. 2d 1235 (La. 1983), *cert. denied*, 470 U.S. 1088 (1985) (holding that there is no requirement that the jury find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances prior to recommending a death sentence).

of jury discretion demanded by *Furman* and subsequent cases. In substance, the proceeding was virtually identical in practice to the pre-*Furman* sentencing proceedings in which a defendant was free to beg for mercy, but the jury was given no guidance whatsoever in distinguishing those who deserved death from those who did not. Petitioner's death sentence therefore violates the Eighth Amendment.

D. Any Arguable Legislative Narrowing At the Guilt Stage Fails to Satisfy *Furman*'s Mandate For Reliable Capital Sentencing.

The precedents discussed in Part II, B, *supra*, make plain that the Eighth Amendment requires a carefully regulated sentencing process above and beyond the guilt-finding process in capital cases. Yet the Fifth Circuit, in rejecting petitioner's claim, embraced the notion that Louisiana's detailed definitions of capital murder themselves satisfy Eighth Amendment concerns over sentencing discretion. *Lowenfield v. Phelps*, 817 F.2d 285, 289 (5th Cir. 1987). In so doing, the Fifth Circuit extended its ruling in *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1984 (1987) to the situation where there is a complete overlap between the definition of the capital crime and any statutory aggravating circumstances found by the sentencer.

The Eighth Circuit properly rejected the Fifth Circuit's approach in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 106 S. Ct. 546 (1985). The Eighth Circuit held that duplicative aggravating circumstances fail to perform the constitutionally mandated task of providing sentencer guidance in narrowing the death-eligible class from among those convicted of murder. 745 F.2d at 264.[24]

---

[24] The *Collins* court was persuaded of this constitutional shortcoming where only one of three statutory aggravating circumstances identified by the jury duplicated the definition of the crime itself. 754 F.2d at 263. This Court need not affirm *Collins* in order to vacate petitioner's sentence. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance found by the

This Court's post-*Furman* precedents indicate that while a finding of an "intention to inflict great bodily injury on more than one person" arguably might satisfy *Furman*'s requirement for a reasonable narrowing criterion, contrary to the Fifth Circuit's suggestion in *Blackburn, supra*, it does not erase the need for a full and meaningful finding of a constitutionally proper aggravating circumstance by an authority consciously engaged in the act of sentencing. Indeed to ignore the role of the sentencer in determining the presence or absence of aggravating factors at the penalty phase would be to repudiate this Court's consistent holdings, culminating just last Term in *Sumner v. Shuman*, 55 U.S.L.W. 4931 (U.S. June 22, 1987), that "narrowly drawn" statutory definitions of "capital murder" cannot, consistent with the Eighth Amendment, replace the need for the exercise of focused discretion at the sentencing stage.

The very Court that decided *Furman* promptly and unequivocally held in other capital cases that the rule laid down in *Furman* could not be satisfied simply by narrowing the definition of a "capital" crime. *Furman*'s invalidation of a Georgia statute applicable to murder generally was immediately perceived by the Court as also governing more narrow *first-degree* murder statutes. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 800 (1972) (invalidating death sentence); *Scoleri v. Pennsylvania*, 408 U.S. 934 (1972) (*per curiam*) (invalidating death sentence). *Furman* was also understood to govern statutes with even narrower definitions of capital crimes. *See, e.g., Duling v. Ohio*, 408 U.S. 936 (1972) (*per curiam*), *summarily rev'g* 21 Ohio St. 2d 13, 254 N.E.2d 670 (Ohio 1970) (striking down statute that permitted a death sentence if the jury found that the victim of the murder was a police officer). The *Furman* Court itself, through these actions, expressed the requirement that legislative channeling of

---

sentencer—with nothing else supporting his sentence of death—so that petitioner's sentence is even more clearly constitutionally infirm.

discretion must be addressed to sentencing, rather than merely to the definition of the capital crime.

The ineffectiveness of narrowing the definition of the capital crime to satisfy *Furman*'s concerns was undersored by the Court's analysis of the statutes in the 1976 companion cases that revalidated the death penalty. Several of these statutes featured narrowed definitions of murder, similar to the Louisiana statute here. In response to *Furman*, Louisiana limited capital homicides to five categories of intentional and knowing murders nearly identical to those delineated in the current Louisiana first-degree murder statute. But in *Roberts v. Louisiana*, 428 U.S. 325 (1976), the Court made clear that such narrowing at the guilt stage alone fails to provide constitutionally adequate legislative guidance on *sentencing*:

> lack of focus on the circumstances of the particular offense and the character and propensities of the offender . . . is not resolved by Louisiana's limitation of first-degree murder to various categories of killing.

oberts v. Louisiana, 428 U.S. at 333 (Stewart, Powell & evens, JJ.). And, as the dissenters in *Roberts* recognized, that decision held Louisiana's statute unconstitutional "for want of a separate sentencing proceeding in which the *sentencing authority may focus on the sentence* and consider some or all of the *aggravating* and mitigating circumstances." *Id.* at 356 (dissenting opinion) (emphasis added).[25]

---

[25] Louisiana's current statute does not appear to have been the product of careful legislative crafting to satisfy the *Furman* Court's penalty-phase concerns. In 1973, the Louisiana legislature amended the state murder statutes and created the narrowly defined crime of first-degree murder, *see Roberts v. Louisiana*, 428 U.S. 325, 328-29 (1976) (Opinion of Stevens, Stewart, and Powell, JJ.), while at the same time making a death penalty for such crimes mandatory in an effort to eliminate juror discretion. La. Rev. Stat. Ann. § 14:30 (1974). The Court invalidated this mandatory statute in *Roberts v. Louisiana*, 428 U.S. 325 (1976). In response, Louisiana adopted a statute almost identical to Georgia's revised law. La. Acts 1976, No. 657, *amending* La. Rev. Stat. §§ 14:30 (1950) and

Nor does this Court's approval of the Texas death penalty statute in *Jurek v. Texas*, 428 U.S. 262 (1976), validate the process by which petitioner was sentenced to death. The Court in *Jurek* held that the Texas statute was constitutional where it required the sentencing jury to answer three questions—clearly focused on sentencing—after its finding of guilt. These questions include whether the convicted murderer would "constitute a continuing threat to society" because of a probability that he or she "would commit [future] criminal acts of violence." Tex. Crim. Proc. Code Ann. § 37.071b(2) (Vernon Supp. 1975-1976). In contrast, the Louisiana statute, as applied to petitioner, failed to require any additional meaningful sentencing inquiry.

30.1 (Supp. 1973). *See* Note, *The Work of the Louisiana Legislature for the 1976 Regular Session—A Student Symposium*, 37 La. L. Rev. 89, 197-198 (1976).

In 1977, the Louisiana Legislature explicitly amended its definition of *second*-degree murder to include all homicides where the offender has a specific intent to kill but where the aggravating circumstances listed in the capital sentencing portion of the statute were not present. *See* Comment, *First-Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Dealth Penalty in Georgia, Florida, Texas and Louisiana*, 24 Loy. L. Rev. 709, 738 (1978). This change was not enacted to limit in any fashion sentencer discretion, but was instead adopted to facilitate prosecutors' efforts to obtain plea bargains, by their being able to offer a noncapital alternative. *See* C. Hancock, *The Perils of Calibrating the Death Penalty Through Special Definitions of Murder*, 53 Tul. L. Rev. 828, 855 n.88 and 859 n.104 (1979). The Louisiana Supreme Court then interpreted this statutory change as an amendment by implication of the State's first-degree murder statute, so as to incorporate the sentencing aggravating circumstances into the definition of *first*-degree murder itself, because second-degree murder excludes such factors. *State v. Payton*, 361 So. 2d 866, 870 (La. 1978). The Louisiana Legislature then codified this interpretation in 1979. *See* Hancock, 53 Tul. L. Rev. at 861 n.108. This tortuous history of the source of the duplication between aggravating circumstances and the definition of capital murder is devoid of any legislative intent to channel juror discretion at the guilt stage of a capital proceeding.

The Court's plurality opinion first suggested that the legislature's narrowing the categories of murders for which a death sentence may ever be imposed may serve "much the same purpose" as a list of statutory aggravating circumstances.[28] 428 U.S. at 270 (Opinion of Stewart, Powell and Stevens, JJ.). Turning its attention to the additional questions the sentencing jury was required to answer, the plurality concluded that these questions were adequate to satisfy *Furman*. *Id.* at 274-76. Although the *Jurek* plurality focused on whether these questions encompass consideration of mitigating circumstances, both this Court and the Texas appellate court have recognized that these questions require a Texas sentencing jury to focus on aggravating as well as mitigating circumstances. *Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 (1986); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981); *Adams v. Texas*, 448 U.S. 38, 46 (1980); *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975). Thus, *Jurek* provides no support for removing meaningful consideration of aggravating factors from the sentencing jury.

Moreover, the plurality's remark about the role played by the jury at the guilt phase in identifying aggravating factors must be understood in the particular context of the Texas statutory scheme. The Texas jury in *Jurek* was specifically informed before the trial that a guilt finding would qualify the defendant for consideration for the death penalty. *Jurek v. State*, 552 S.W.2d 934, 938 (Tex. Crim. App. 1975). The jury acquired this information as a result of guidance in the Texas statute, which provided:

---

[28] The Court's language in *Jurek* cannot, of course, be understood in isolation. It must be read together with the Court's statements in the more extensive 1976 companion cases. In *Jurek*, the Court had no need to reiterate the principles it clearly set forth in *Gregg v. Georgia*, 428 U.S. 153 (1976), most notably the explicit requirement that a jury find a statutory aggravating circumstance before recommending a sentence of death. *See* 428 U.S. at 197.

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Penal Code Ann. § 12.31(b) (Vernon 1974). *See generally Adams v. Texas*, 448 U.S. 38 (1980) (discussing operation of this statutory provision). The Texas jury, even in making its initial guilt determination, was given guidance allowing it to focus on relevant sentencing considerations.

In contrast, petitioners' Louisiana jury had no similar indication that its initial guilt phase finding of an aggravating circumstance would effectively control its sentencing determination and that the jury would be uninstructed in reevaluating this finding. The jury's initial guilt determination in petitioner's case—which incidentally found an element that was identical to that in an aggravating circumstance—did not have any role in guiding jury *sentencing* discretion in selecting petitioner for the death sentence. The jury did not understand that—at the guilt phase—it was engaged in a process that would ultimately control the question whether petitioner should live or die. Indeed, the judge explicitly told the jury to completely ignore any penalty consequences of its guilt phase determination, Trial Transcript of May 14, 1984 at 57, as he properly should have, in view of the statutory requirement that the guilt and penalty considerations are to be made separately. Thus, unlike in *Jurek*, there was no room for the jurors to exercise their full range of judgment at the penalty phase. *See Adams v. Texas*, 448 U.S. at 47.

Accordingly, legislative narrowing at the guilt stage failed to provide any constitutional basis for sentencing petitioner to death.

E. Upholding the Decision Below Would Set into Process An Intrusive Constitutional Inquiry into the Adequacy of State Substantive Criminal Laws.

Since 1972, the Court has striven to clarify and settle the meaning of *Furman v. Georgia*, 408 U.S. 238 (1972). In so doing, it has focused its Eighth Amendment constitutional inquiry on the adequacy of state *procedures* in preventing the risk of arbitrary and capricious sentencing. *See, e.g., California v. Ramos*, 463 U.S. 992, 999 (1983) ("In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more with the *procedure* by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty") (emphasis in original); *Barclay v. Florida*, 463 U.S. 939, 963 (1983) (Stevens and Powell, JJ., concurring); *Gregg v. Georgia*, *supra*, 428 U.S. at 179 (Opinion of Stewart, Powell, and Stevens, JJ.).

To shift the long-standing focus in death penalty cases from the process of selecting which defendants convicted of murder shall die to a review of the definition of capital murder would invite a protracted inquiry into the adequacy of state substantive criminal laws. For this Court to suggest that Louisiana's definition of capital homicide, which purports to transplant Eighth Amendment procedural requirements into the substantive criminal law, is "narrow enough" to satisfy the concerns of *Furman*—without requiring the finding of any non-duplicative statutory aggravating circumstances—would oblige the Federal courts similarly to determine whether the wide variety of state capital murder statutes—with elaborate definitions somewhere between the narrowness of the Louisiana and the broadness of the Georgia statutes—are also "narrow enough" to pass constitutional muster.

This course of inquiry, due to its substantive focus, would run contrary to fundamental notions of federalism.

See, e.g., Tigner v. Texas, 310 U.S. 141, 149 (1940) (substance of state criminal law is a matter of unique legislative competence). The Court would also be embarking on an entirely new course of constitutional adjudication, because it would be required to make these determinations on the basis of standards that are not enunciated in *Furman* or in any other of its capital decisions. On the contrary, a holding that enforces the requirement of standardized selection from the death-eligible class by reaffirming what the Court has already made apparent in *Zant*, *Godfrey*, and *Gregg* would accord with the Court's death penalty constitutional jurisprudence and would aid in further settling the meaning of this Court's action in *Furman v. Georgia*.

F. The *Pro Forma* Consideration Given to Aggravating Circumstances at Petitioner's Sentencing Hearing Denied Due Process.

Even if the Eighth Amendment does not, as petitioner contends, require a sentencing jury to find aggravating circumstances before sentencing a convicted murderer to death, Louisiana law requires the sentencing jury to make such a finding at that stage of a capital trial. Under Article 905.3 of Louisiana's Code of Criminal Procedure, the sentencing jury may not impose the death penalty unless it finds, beyond a reasonable doubt, a statutorily-enumerated aggravating factor. This requirement was subverted because the jury's sentencing phase finding was, at best, a mere echo of its guilt phase decision on the identical aggravating circumstance. At worst, the jury's decision was the product of utter confusion because it had no way to understand the legal effect of its prior guilt phase determination of the identical "aggravating" finding. Because of the absence of useful instruction, the jury's sentencing determination failed to come to grips with the "awesome responsibility of decreeing death for a fellow human." *Caldwell v. Mississippi*, 472 U.S. 320, 329-330 (1985), *citing McGautha v. California*, 402 U.S. 183, 208 (1971).

Fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial. *Presnell v. Georgia*, 439 U.S. 14, 16 (1978).[27] Having required the sentencing jury to make a finding on an aggravating circumstance, the state was obliged to assure that such a finding was made in accordance with due process. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432-34 (1982); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Even had the sentencing jury not been coerced, as described in Part I, *supra*, petitioner's sentencing proceeding was devoid of the necessary character and focus of a meaningful sentencing inquiry and so heavily stacked against petitioner as to amount to a charade.

At petitioner's sentencing hearing, both Louisiana law and the Due Process clause required the prosecution to establish to the satisfaction of a jury the existence of a statutory aggravating factor, and to do so beyond a reasonable doubt.[28] In American criminal jurisprudence the jury's fundamental function is "to maintain a link between contemporary community values and the penal system," *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), and to "stand between the accused and a poten-

---

[27] *See also Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (double jeopardy protections attach at the penalty phase of a capital trial "because [the capital sentencing] proceeding is like a trial"); *Bullington v. Missouri*, 451 U.S. 430 (1981) (same); *Estelle v. Smith*, 451 U.S. 454 (1981) (Fifth and Sixth Amendment rights apply at the penalty phase of a capital proceeding).

[28] The Constitution arguably does not require any particular standard for balancing aggravating against mitigating factors. *See Zant v. Stephens*, 462 U.S. at 875 n.13; *Ford v. Strickland*, 696 F.2d 804, 817-19 (11th Cir.) (*en banc*), *cert. denied*, 464 U.S. 865 (1983). It does, however, require adequate proof of the truth of the factors upon which the State relies in seeking to impose the death penalty. *See In re Winship*, 397 U.S. 358 (1970); *Presnell v. Georgia*, 439 U.S. 14 (1978).

tially arbitrary or abusive Government that is in command of the criminal sanction," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977). Moreover, when, as in Louisiana, a jury is given the "awesome responsibility" of determining the appropriateness of death, its consideration must embrace a reasonable moral inquiry, *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring), into the myriad of circumstances involving the defendant's background, character, and the circumstances of the crime, *Woodson v. North Carolina*, 428 U.S. 280, 304, (1976), and must engage in this task with full awareness of the nature of its responsibility, the gravity of its task, and the consequences of its actions. *Caldwell v. Mississippi*, *supra* at 329-330, 341. *See also Lockhart v. McCree*, 106 S. Ct. at 1770 n.18 (recognizing that jury role in sentencing is broader than in guilt/innocence determination); *State v. Williams*, 392 So. 2d 619, 634-35 (La. 1980) (due process requires that sentencing jury be informed of consequences of its decision). At a minimum, these requirements must mean that the jury must consider aggravating factors freshly and that its findings must not be foreordained by findings previously made. *See, e.g., Sparf v. United States*, 156 U.S. 51 (1895) (directed verdict forbidden in criminal case). Louisiana's Supreme Court itself has recognized that sentencing juries may not, constitutionally, be "bound" by findings made at the guilt-determining stage. *State v. Knighton*, 436 So. 2d 1141 (La. 1983), *cert. denied*, 465 U.S. 1051 (1984); *State v. Clark*, 387 So. 2d 1124, 1132 (La. 1980), *cert. denied*, 449 U.S. 1103 (1981).

In convicting petitioner of the crime of murder the guilt-determining jury necessarily found that petitioner had intended to inflict death or bodily injury on more than one person. The guilt phase determination of a statutory aggravating circumstance—totally devoid of any consideration of the appropriate penalty—never was envisioned as satisfying the sentencing protections held

out by Louisiana's statute. It is inconceivable that the same jurors, sitting three hours later as the sentencing jury, could have independently considered this issue at the sentencing stage and *not* considered itself "bound" by its prior finding. This is especially so where the jury was left uninstructed as to the weight it should give its prior finding.[29] The jury was unaware that it could and should "exercise a range of judgment and discretion while remaining true to [its] instructions and [its] oaths," in deciding upon an appropriate sentence. *Adams v. Texas*, 448 U.S. 38, 47 (1980). And in the context of the pressures exerted on the "great[ly] distress[ed] [and] unbalance[d]" jury, as discussed in Section I, *supra*,—making it impossible for the holdout jurors to sustain their position that death was inappropriate—the jury's sentencing determination was wholly inadequate.

---

[29] The trial judge's general charge on "reasonable doubt" made no reference to the jury's prior findings, and a lay jury could scarcely be thought to have inferred from this general charge that it would not be bound by prior findings that it had just made "beyond a reasonable doubt." *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (clear sentencing guidelines essential to aid a jury in understanding complex legal principles). Nor was the prosecutor's remark that the jury needed to "reconsider" its earlier finding at all adequate to cure this deficiency. Reconsideration implies only "another look" and does not request the decisionmaker to exercise an independent judgment. *See Walker v. Jim Dandy Co.*, 97 F.R.D. 505, 507, 511 (N.D. Ala. 1983), *aff'd in part and rev'd in part on other grounds*, 747 F.2d 1367 (11th Cir. 1984).

Any instruction that the jury was not bound by its guilt phase determination of the identical aggravating circumstance, without any further instruction on the difference in the nature of its guilt and sentencing judgments, would be problematic because it would invite the jury to disregard the evidence, a result the Eighth Amendment cannot tolerate. *See, Woodson v. North Carolina*, 428 U.S. 280, 302-303 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (potential for juror nullification may invalidate death penalty statute), *Roberts v. Louisiana*, 428 U.S. 325, 335 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (same). *Cf. California v. Brown*, 107 S. Ct. 837 (1987) (upholding instruction designed to discourage nullification).

As a consequence of the circumstances discussed above, the Louisiana statute's promise to the petitioner of a carefully focused jury sentencing determination—reflecting full cognizance of the solemn gravity of its task—was never fulfilled. The injection of the sole identical insufficient "aggravating" circumstance into the penalty phase made a mockery of petitioner's sentencing proceeding and perpetuated the Eighth Amendment and due process constitutional deficiencies by "simply paper[ing] over the problem of unguided and unchecked jury discretion." *Gregg v. Georgia*, 428 U.S. at 302 (opinion of Stewart, Powell, and Stevens, JJ.).

CONCLUSION

For the reasons set forth above, petitioner was unconstitutionally sentenced to die by a coerced jury that, as a result of the Louisiana sentencing statute, was not required to come to terms with petitioner's appropriate sentence. On each and both of these grounds, petitioner's sentence of death must be vacated and the decision below of the United States Court of Appeals for the Fifth Circuit must be reversed.

Respectfully submitted,

Of Counsel:

MAURICE ROSS
395 South End Avenue
New York, New York 10280

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

GARY S. GUZY *
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 483-8860
Counsel for Petitioner

* Counsel of Record

August 6, 1987

STATUTORY APPENDIX

STATUTORY APPENDIX

Louisiana Code of Criminal Procedures Annotated
(West 1984 & Supp. 1986)

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art.

905. Capital Cases; sentencing hearing required.
905.1. Sentencing hearing jury; commencement.
905.2. Sentencing hearing; procedure and evidence.
905.3. Sentence of death; jury findings.
905.4. Aggravating circumstances.
905.5. Mitigating circumstances.
905.6. Jury; unanimous recommendation.
905.7. Form of recommendations.
905.8. Imposition of sentence.
905.9. Review on appeal.

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1. Sentencing hearing jury; commencement

A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in

Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled.

Art. 905.2. Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Art. 905.3. Sentences of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The court shall instruct the jury concerning all of the statutory mitigating circumstances. The court shall also instruct the jury concerning the statutory aggravating circumstances but may decline to instruct the jury on any aggravating circumstance not supported by evidence. The court may provide the jury with a list of the mitigating and aggravating circumstances upon which the jury was instructed.

Art. 905.4. Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or aggravated kidnapping;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

(j) the victim was under the age of twelve years.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable,

marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

Art. 905.5. Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6. Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unan-

imously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7. Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

s/ _____
Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence.

s/ _____
Foreman"

Art. 905.8. Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9. Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Supreme Court, U.S.
FILED
SEP 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,

VERSUS

C. PAUL PHELPS,
Secretary of the Department of Corrections
State of Louisiana, *et al.*,
Respondents.

On Writ of Certiorari to the United States Courts of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENT

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA
234 LOYOLA AVENUE
SUITE 700
NEW ORLEANS, LOUISIANA
70112

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST*
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020
Counsel For Respondent

*Counsel of Record

ACCURATE LETTER CO. — 522-9092 — NEW ORLEANS, LOUISIANA 70130

BEST AVAILABLE COPY

THE QUESTIONS PRESENTED

(1) Did the sentencing hearing violate the petitioner's right to a fair trial and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, where the trial court repeated his initial instruction on reexamining one's views in the course of jury deliberation and twice polled the jury on the value of further deliberations in response to the jury's notes?

(2) Did the Louisiana's capital sentencing statute, as applied to petitioner, violate the Eighth and Fourteenth Amendments of the United States Constitution where the imposition of the death sentence was based on a single aggravating circumstance which was also an element of the underlying crime of First Degree Murder, La. R.S. 14:30, of which petitioner was convicted?

TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PARTIES TO PROCEEDING	ix
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	
I. The Sentencing Hearing Was Not Unfair And Did Not Coerce A Death Verdict In Violation Of Due Process And The Eighth And Sixth Amendments	11
A. Constitutional Standards Regarding Jury Charges And "Allen Charges"	12
B. United States Supreme Court's View On Inquiry Of Juror Division	25
C. Federal Constitutional Standards On Allen Charges And Juror Inquiry	29
D. Louisiana Law	39
E. There Was No Violation Of The Sixth And Fourteenth Amendments	40

TABLE OF CONTENTS cont'd

Page

Conclusion 44

II. Petitioner's Death Sentence Based On A Sole Statutory "Aggravating" Circumstance That Merely Repeats An Element Of The Crime Does Not Violate The Eighth Amendment Requirement That Sentencer Discretion Be Directed And Limited So As To Minimize The Risk Of Arbitrary And Capricious Executions 45

A. Louisiana's Statutory Capital Scheme 46

B. Constitutional Guidelines For Capital Sentencing Schemes Delineated By The United States Supreme Court Since Furman v. Georgia 50

C. Standard of Review 66

D. Federal Appellate Courts 68

Conclusion 72

CONCLUSION 73

TABLE OF AUTHORITIES

Cases	Page
Allen v. United States, 164 U.S. 492 (1896)	12
Barclay v. Florida, 463 U.S. 951, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983)	64
Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135 (1926)	26
California v. Brown, 107 S.Ct. 837 (1987)	19
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985)	68
Cornell v. State of Iowa, 628 F.2d 1044 (8th Cir. 1980), cert. denied 449 U.S. 1126, 101 S.Ct. 944, 67 L.Ed.2 112 (1981)	37
Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)	20
Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979), cert. denied ____ U.S. ____, 104 S.Ct. 338, 78 L.Ed.2d 307 (1984)	37
Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)	21

TABLE OF AUTHORITIES cont'd

	Page
Furman v. Georgia, 408 U.S. 238 (1972)	11
Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)	20
Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)	61
Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977)	18
Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980)	42
Jenkins v. United States, 380 U.S. 445 (1965)	14
Jones v. Norwell, 472 F.2d 1185 (6th Cir. 1973)	34
Jurek v. Texas, 96 S.Ct. 2950 (1976)	51
Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)	44
Locks v. Sumner, 703 F.2d 403 (9th Cir. 1983)	34

TABLE OF AUTHORITIES cont'd

Page

Monroe v. Blackburn,
748 F.2d 958 (5th Cir. 1984) 30

Potter v. United States,
691 F.2d 1275 (8th Cir. 1982) 29

Spaziano v. Florida,
468 U.S. 447,
104 S.Ct. 3154,
82 L.Ed.2d 340 (1984) 44

State v. Knighton,
436 So.2d 1141 (1983) 71

State v. Lowenfield,
495 So.2d 1245 (La. 1985) 39

United States v. Blanden,
784 F.2d 1048 (10th Cir. 1986) 30

United States v. Chanya,
700 F.2d 192 (5th Cir. 1983) 33

United States v. Cook,
663 F.2d 808 (8th Cir. 1981) 33

United States v. Gordon,
780 F.2d 1165 (5th Cir. 1986) 30

United States v. Rengifo,
789 F.2d 975 (1st Cir. 1986) 30

United States v. Rey,
811 F.2d 1453 (11th Cir. 1987) 30

United States v. Robinson,
560 F.2d 507 (2nd Cir. 1977) 30

United States v. Skillman,
442 F.2d 542 (8th Cir. 1971) 33

TABLE OF AUTHORITIES cont'd

Page

United States v. United States Gypsum Co.,
438 U.S. 422,
98 S.Ct. 2864
57 L.Ed.2d 854 (1978) 15

Welcome v. Blackburn,
793 F.2d 672 (5th Cir. 1986) 70

Williams v. Parke,
741 F.2d 847 (6th Cir. 1984) 29

Woodson v. North Carolina,
428 U.S. 280,
96 S.Ct. 2978,
49 L.Ed.2d 944 (1976) 56

Zant v. Stephens,
462 U.S. 862,
103 S.Ct. 2733,
77 L.Ed.2d 235 (1983) 44

Statutes

La. Rev. Stat. Ann. § 14:30 (3) 1

La. Rev. Stat. Ann. § 14:30.1 53

La. Code Crim. Proc. Ann. Art. 905.1 41

La. Code Crim. Proc. Ann. Art. 905.4 58

La. Code Crim. Proc. Ann. Art. 905.5 48

La. Code Crim. Proc. Ann. Art. 905.5(h) 59

La. Code Crim. Proc. Ann. Art. 905.8 11

La. Rev. Stat. Ann. § 14 (West 1982) 46

PARTIES TO PROCEEDING

Leslie Lowenfield, Petitioner

Maurice Ross, Counsel For Petitioner
Nancy J. Marshall, Counsel For Petitioner
Steven A. Hirsch, Counsel For Petitioner
David Klingsberg, Counsel For Petitioner
Gary S. Guzy,
KAYE, SCHOLER, FIERMAN, HAYS AND HANDLER
Counsel For Petitioner

C. Paul Phelps,
Secretary of the Department of Corrections

William J. Guste, Jr.,
Attorney General, State of Louisiana

John M. Mamoulides,
District Attorney for Jefferson Parish

Dorothy A. Pendergast,
Assistant District Attorney

STATEMENT OF THE CASE

Petitioner was charged by grand jury indictment with five counts of first degree murder, violations of La. R.S. 14:30(3). On May 8 - 15, 1984, petitioner was tried by a twelve person jury which found him guilty of three (3) counts of first degree murder[1] and two (2) counts of manslaughter[2]. On May 15 - 16, 1984, petitioner's sentencing phase was tried before the same twelve person jury and it recommended the death penalty for each of the three first degree murder convictions. Now petitioner is before this Honorable Court for a review of the sentencing phase of his bifurcated trial as to its fairness and due process.

---

1 Sheila Thomas, Petitioner's former live-in girlfriend; Carl Osborne, the father of Ms. Thomas's child; Myrtle Griffen, Ms. Thomas's mother.

2 Shantell Osborne, Ms. Thomas's child; Owen Griffen, Ms. Thomas's stepfather.

The guilt phase of the trial ended at 11:30 a.m., on May 14, 1984, when the trial court read the charges to the jury. At 11:45 a.m., the jury retired to deliberate. During the afternoon the jury asked the court three questions and requested some evidence. At 7:45 p.m. the jurors requested that they have dinner and retire for the evening. (Joint Appendix, 14-15). (Joint Appendix hereafter referred to as J.A.).

Deliberation began the next morning, May 15, 1984, at 10:05 a.m. Again, throughout the day the jurors requested evidence, and asked a question. After deliberating about 13 hours on five counts of first degree murder, the jury returned to the courtroom at 4:20 p.m. with the five guilty verdicts. (J.A. 9, 25).

After a short recess the defense moved that the sentencing phase of the trial on the 3 first degree murder convictions be delayed by 24 to 48 hours. The state objected to this delay. The trial court checked with the jurors regarding their mental and physical conditions and decided to deny the defense motion since the jurors unanimously indicated they had no need for time to rest. (J.A. 28). Over the defense's objection the sentencing phase commenced at 6:05 p.m. that same day.

After presentation of evidence and closing arguments by counsel at the penalty phase, the judge again instructed the jury (J.A. 43-47):

1. On finding an aggravating circumstance beyond a reasonable doubt (J.A. 44);

2. On considering mitigating evidence (J.A. 44-45);

3. On the charge as not being the opinion of the Court (J.A. 45-46);

4. On the imposition of a life sentence if the jury is unable to agree on a recommendation (J.A. 46);

5. On the reconsideration of one's views (J.A. 46).

Then the jury retired to deliberate at 8:17 p.m. (J.A. 7). At 11:27 p.m., the jury returned with two questions: (1) a clarification of "recommends" and (2) whether or not an automatic life sentence is imposed if a unanimous verdict cannot be reached. After the judge responded in open court the jury returned for more deliberations but requested to retire for

the evening at 11:55 p.m. They had been deliberating for 3 hours and 38 minutes on the penalty for each of the first degree murder convictions.

On May 16, 1984, the jurors returned to deliberate at 9:40 a.m. Two hours and five minutes later defense counsel made an oral motion for a mistrial based on the length of time that the jury had been deliberating as to the penalty (by this time the jury had been deliberating a total of five hours and 43 minutes on the penalties), and on the residual effect of the trial court's final instructions at the guilt phase. (J.A. 24, 51).

At 3:00 p.m., the defense made a second motion for a mistrial based on the length of the deliberations, (eight hours and 43 minutes) Id., and immediately thereafter another motion based on the note that had been received from the

jury[3]. The trial court delayed a ruling on the defense motions until he responded to the jury's request. Before the jurors returned to the courtroom the prosecutor reminded the court of the stipulation that had been agreed on in chambers in regard to inquiring whether or not the jury was deadlocked. The judge was to read the last sentence of the penalty phase instructions, then ask the jury if they had reached a verdict on any counts and, if not, whether further deliberations would be beneficial. Each juror was to have a piece of paper on which to write their response concerning the advisability of further deliberations. (J.A. 52).

3

Judge Cannella 3-16-84 3:00 PM

The jury is having great distress and is unable to reach a decisio.. at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to it's responsibilities and the oath we took.

Anthony S. Conzoner:

The trial court denied the defense's first motion and called in the jury. (J.A. 53). In response to the trial court's question the foreman said that the jury had not reached a verdict on any of the three counts. Id. The judge then repeated the law that a sentence of life imprisonment would be imposed if a unanimous recommendation could not be reached. (J.A. 54). Each juror was given a piece of paper on which he was to write his name and "yes" or "no" to answer the question:

> ". . . if further deliberations would be helpful in obtaining a verdict."

The jury then left the courtroom and the count was made: four jurors responded "no" and eight responded "yes". Id. Thereafter the trial court denied defense's motion for a mistrial. (J.A. 55).

Shortly, the jury sent another note stating that some jurors had misunderstood the question. (J.A. 17,55). The jury returned at 3:25 p.m. for the trial court to rephrase the question:

> "Do you feel further deliberations will enable you to arrive at a verdict?" (J.A. 55).

After following the same procedures as before the jury was again instructed on the imposition of a life sentence if it failed to agree unanimously on a verdict as well as given the charge regarding reconsideration of one's views. See J. A. 56.

The jurors were removed from the courtroom and their responses tallied: eleven "yes" and one "no". (J.A. 18).

Fifty-five minutes later, at 4:20 p.m., the jurors were returned to the

courtroom based on their note indicating they had reached a verdict. (J.A. 18). By this time the jury had deliberated about ten hours on the sentences for three counts of first degree murder. After the three sentences of death and their supporting aggravating circumstances were read in open court the jury was polled in writing. (J.A. 58). Thereafter the jurors were dismissed. (J.A. 59).

SUMMARY OF ARGUMENT

The two incidents of jury instructions, or modified "Allen charges" do not violate the constitutional standards of the Sixth, Eighth and Fourteenth Amendments since the modified "Allen charge" did not mention minority or majority views, the charges reminded the jury of the consequences of a

deadlock, the charges cautioned against relinquishing an honest view to reach a verdict, and were given at the request of the jurors who never claimed to be deadlocked. The jury inquiry was also not unconstitutional since it sought guidance on the benefits of further deliberations and the results were not made known to the jurors so as to coerce them.

Despite the result herein that the single aggravating circumstance upon which the death penalty was based repeats an element of the crime, the Louisiana Capital Sentencing Hearing provides limits that individualize and particularize the hearing to the defendant and the offense. Furthermore, the sentence of death is automatically reviewed by the Louisiana Supreme Court to determine if the sentence was imposed

as the result of passion, prejudice or other arbitrary factors. This bifurcated capital scheme reflects the constitutional standards established by this Court since Furman v. Georgia, 408 U.S. 238 (1972).

ARGUMENT

I.

The Sentencing Hearing Was Not Unfair And Did Not Coerce A Death Verdict In Violation Of Due Process And The Eighth And Sixth Amendments.

Petitioner bases his argument herein on the alleged "Allen charge" twice given by the trial court, one of which was the alleged "dynamite charge" given shortly before a verdict was rendered, the polling of the jury and the length of the jury deliberation. He claims that since Louisiana' statute, La.C.Cr.P. art. 905.8 (West 1986), mandates imposition of life

imprisonment when a jury fails to reach a unanimous verdict at the penalty phase, there was no justification for the conduct of the sentencing hearing. As a result of the alleged coercive conduct the petitioner claims that he was denied a fair and impartial trial under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. Constitutional Standards Regarding Jury Charges And "Allen Charges"

This Honorable Court first recognized the appropriateness of instructing a jury that each juror should consider the views of the other jurors, if they differ, with the expectation that there may be a reasonable doubt in the correctness of their own judgment in Allen v. United States, 164 U.S. 492

(1896). This Court found no error in these instructions as summarized therein:

> "These instructions were quite lengthy, and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions

> were taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in Com. v. Tuey, 8 Cush. 1, and by the Supreme Court of Connecticut in State v. Smith, 49 Conn. 376, 386.

Allen v. United States, at 501.

In declaring no error this Court said that it cannot be that each juror should go into the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of other men. Id. Now known as the "Allen charge", this instruction has never been declared per se error by this Honorable Court.

In a Per Curiam opinion, Jenkins v. United States, 380 U.S. 445 (1965), this Court did hold that the judge's statement to the jury after 2 hours of deliberation and a note that declared it was unable to

agree upon a verdict "on both counts because of insufficient evidence" was reversible error. The judge stated, "You have got to reach a decision in this case." The Court concluded that "in its context and under all the circumstances the judge's statement had the coercive effect attributed to it". Jenkins, supra at 446. Since there was not an "Allen charge" in Jenkins and the judge in the instant case did not make any such blatant statement, Jenkins offers no resolution or guidance in the case at bar.

Thirteen years later the Supreme Court again addressed the effect of an "Allen charge" in United States v. United States Gypsum Co., 438 U.S. 422, 57 L.Ed.2d 854, 98 S.Ct. 2864 (1978), an antitrust suit. Prior to the commencement of deliberations, the judge

in Gypsum had included in his charge the statement "to deliberate with a view toward reaching an agreement if you can, without violence, to individual judgment". After five days of tense deliberation the judge gave the jury a modified "Allen charge" in the course of answering other questions. He repeated the charge on the sixth day in response to a jury note that it was unable to reach a verdict. On the seventh day the jury foreman requested a meeting with the judge. The judge met alone, with the acquiescence of counsel, with the foreman to assess the state of affairs of the jury. The transcript of the meeting revealed that the jury was deadlocked and that the judge gave a strong impression that he wanted a verdict one way or the other. These communications were not included in the judge's report to

counsel. The opinion stated that the ex parte meeting between the judge and jury foreman was improper and alone warranted reversal. Without making a reference to the modified "Allen charges", the court stated its bases for reversal:

> "Thus, it is not simply the action of the judge in having the private meeting with the jury foreman, standing alone--undesirable as that procedure is--which constitutes the error, rather, it is the fact that the ex parte discussion was inadvertently allowed to drift into what amounted to a supplemental instruction to the foreman relating to the jury's obligation to return a verdict, coupled with the fact that counsel were denied any chance to correct whatever mistaken impression the foreman might have taken from this conversation, that we find most troubling.

Again, this was a situation that involved facts other than an "Allen charge" which constituted the reversible

error. In fact, again, it was the judge's strong suggestion to reach a verdict regardless that caused error. Unlike in Gypsum, supra, the judge in the case at bar informed the jury when he repeated the charge that a life sentence would be imposed if it could not agree to a verdict. The factual difference of Gypsum makes it inapplicable to the case at bar.

This Honorable Court has set guidelines for determining if a jury instruction is reversible error under due process. In Henderson v Kibbe, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977): this Court stated:

> "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing

> required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," Cupp v. Naughten, 414 U.S., at 147, 38 L.Ed.2d 368, 94 S.Ct. 396, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned,'" id., at 146, 38 L.Ed.2d 368, 94 S.Ct. 396.

Henderson v. Kibbe, at 154.

In reviewing the jury instruction at the penalty phase of a capital murder trial in California v. Brown, 107 S.Ct. 837, 839 (1987), this Supreme Court repeated the two prerequisites to a valid death sentence under the Eighth Amendment:

1. Sentencers may not be given unbridled discretion in determining the fates of the accused. The statute must be structured to prevent an

arbitrary and unpredictable administration, Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972);

2. The capital defendant must be allowed to introduce any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." Eddings v. Oklahoma, 455 U.S. 104, 455, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982).

Hence, when looking at a jury instruction as an Eighth Amendment violation, it must be reviewed as to its violation of one of the above standards. This Court further stated that the review

must focus on what a reasonable juror could have understood the charge as meaning. California v. Brown, 107 S.Ct. at 839; Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 1971-1972, 85 L.Ed.2d 344 (1985). That inquiry requires a focus initially on the specific language challenged. California v. Brown, 107 S.Ct. at 839. If the specific instruction fails constitutional muster, it then must be reviewed as a whole to see if the entire charge delivered a correct interpretation of the law. Id.

It is the State's position that in this case a reasonable juror would not have interpreted the challenged instruction as coercive such that it would be unconstitutional.

The judge's initial instruction here cautioned the jurors to reconsider their

views. He made no reference to majority or minority views, the essence of the "Allen charge". He also stressed that the aggravating circumstance(s) had to be found beyond a reasonable doubt and that if the jury could not reach a unanimous verdict that a sentence of life imprisonment would be imposed. The judge added the caution that the instructions were not to be construed as an opinion of the court. Besides considering the statutory aggravating circumstances the jury was told to weigh the mitigating factors in considering the sentence. (J.A. 43-47). Taken as a whole the original jury instructions do not violate the Eighth Amendment under the aforementioned standards. Taken as a whole the instructions would not coerce a reasonable juror into reaching a verdict.

The analysis must now focus on the effect on the jury of the charges that were given twice during deliberations. The first was after a total of 8 hours and 43 minutes of deliberations when the jury requested further instruction from the judge because of their "great distress and confusion", not that they were deadlocked. In response, the judge repeated the consequence of the jury's failure to agree unanimously on a sentence, then asked if the jury had arrived at any verdicts. He then polled the jury to see if further deliberations would be beneficial. The 8 to 4 results were not read in the presence of the jury so as to have had a coercive effect on it. This charge merely repeated the law, and the poll was directed to the advisability of further deliberations, not toward the count for life or death.

About twenty minutes later, the jury requested additional instruction based on a misunderstanding of the question previously asked. Thus the jury was again questioned regarding the value of further deliberations at its request. But this time the trial court, after repeating the consequences of the jury's failure to unanimously agree on a verdict, instructed the jurors on reconsidering their views to reach a verdict if it could be done without violence to their individual judgment. He cautioned the jurors against surrendering their honest beliefs because of the views of fellow jurors or for the mere purpose of returning a verdict. Fifty-five minutes later the jury returned three sentences of death.

These two incidents of jury instruction do not violate any

constitutional standards enunciated by this Honorable Court. The so called "Allen charges" did not mention minority or majority views; the charges reminded the jurors of the consequences of a deadlock; they also cautioned against relinquishing an honest view to reach a verdict; they were given at the request of the jurors who never claimed to be deadlocked. (Distress and confusion are not deadlocked.) Those charges to the jury could not be construed as coercive by a reasonable jury. Hence, the charges do not violate constitutional standards of the Eighth Amendment.

B. United States Supreme Court's View on Inquiry of Juror Division

Petitioner argues that the charges combined with the inquiry of the juror

division produced the coercive effect that violated the Eighth Amendment and the fundamental fairness and due process of the penalty phase of the bifurcated trial.

This Honorable Court expressed its views on such inquiry in Brasfield v. United States, 272 U.S. 448, 47 S.Ct. 135 (1926). There, the judge, after several hours of jury deliberation, inquired how it was divided numerically. The foreman informed him that the count was 9 to 3 without indicating which number favored a conviction. Without much discussion this Court condemned the practice:

> "We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division.

Brasfield v. United States, 47 S.Ct. at 135.

At the first blush this language might indicate a reversal in the instant case. But factually the cases differ in key areas. In Brasfield, the judge inquired regarding the juror count on guilt or innocence. In the case at bar, the judge inquired regarding the count on the benefits of further deliberations. As the Brasfield court stated, such an inquiry regarding the count on guilt or innocence serves no useful purpose. Whereas the inquiry here aided the judge in his decision of when to declare a mistrial. After seven days of trial and deliberations, a declaration of a mistrial was a decision with major consequences. When a majority of the jurors felt further deliberations would be beneficial, a mistrial would not be

warranted. The fact that there were two inquiries was not coercive since it was the jury itself that requested the repetition of the question. The change in the vote on second polling could have been the result of three juror's misunderstanding and not of coercion. When eleven jurors wished to continue deliberations a mistrial would not be appropriate and the trial court properly apprised itself of this situation. Hence, the inquiry in the case at bar was not the same substantive inquiry as in Brasfield, and, contrary to Brasfield, it did serve a useful purpose.

After reviewing the facts under the guidelines of this Honorable Court, it is clear that the jury charges combined with the juror inquiry did not violate the Eighth Amendment nor the fundamental fairness and due process of petitioner's trial.

C. Federal Constitutional Standards on Allen Charges and Juror Inquiry

Nine of the twelve Federal Appellate Circuits have continued to maintain convictions on review where alleged constitutional violations were based on an "Allen charge", or repetition of an "Allen charge". These courts have continued to emphasize the appropriate constitutional inquiry as to whether in its context and under all circumstances the "Allen charge" was coercive. Jenkins v. United States, supra; Williams v. Parke, 741 F.2d 847 (6th Cir. 1984); Potter v. United States, 691 F.2d 1275 (8th Cir. 1982). In the course of developing an analysis, the Courts have established that the "Allen charge" should be incorporated into the body of

the Court's original instructions to the jury. United States v. Blanden, 784 F.2d 1048, 1050 (10th Cir. 1986); Potter v. United States, supra at 1277. Although it has been cautioned that the charge should not be given during deliberation, Circuits have held either no error or harmless error when so given after reviewing the totality of the circumstances. United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986); United States v. Robinson, 560 F.2d 507 (2nd Cir. 1977); United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986); United States v. Rey, 811 F.2d 1453 (11th Cir. 1987); Monroe v. Blackburn, 748 F.2d 958 (5th Cir. 1984); Williams v. Parke, supra.

In the instant case the so called "Allen charge" was included in the original charge to the jury at the end of

the penalty phase. (J.A. 43-47). Although the modified "Allen charge" portion of the original charge was repeated once during deliberations, (J.A. 56), the substance of that charge must be carefully considered to determine whether the language in the context of all the circumstances was coercive in nature. Potter v. United States, 691 at 1271; Jenkins v. United States, 85 S.Ct. at 1060.

First the judge reminded the jurors that a sentence of life imprisonment without benefit of parole, probation or suspension of sentence would be imposed if the jury was unable to agree on a recommendation. Then the judge reminded the jury of their duty to consider each other's views and discuss the evidence "with the objective of reaching a just verdict if you can do so without violence

to that individual judgment." (J.A. 56). This latter sentence is not an order to reach a verdict, or a "dynamite charge", but a reminder to the jury of the goal of deliberations, a verdict. The clause following tempered the objective by reminding the jurors to adhere to their personal judgments if acquiescence would violate their conscience.

Lastly, the judge reminded the jurors to decide the case for themselves after discussion with fellow jurors. He urged them to reconsider their views and change their opinion if "you are convinced you are wrong". The judge ended the colloquy by cautioning the jurors to not surrender their honest belief based on the opinion of fellow jurors or for the purpose of a verdict. Id.

This instruction is innocuous and nothing more than a gentle reminder to

further consider the evidence and attempt to arrive at a verdict. Potter v. United States, supra; see e.g., United States v. Cook, 663 F.2d 809-810 (8th Cir. 1981); United States v. Skillman, 442 F.2d 542 558-59 n. 13 (8th Cir. 1971).

Within the context of the entire penalty phase of the trial, it cannot be viewed as coercive. The jury never announced a deadlock. It merely expressed "great distress and confusion". When polled as to the benefits of further deliberations the jury wished to continue eleven to one. Furthermore, the instruction does not contain any of the reversible errors from prior cases. United States v. Chanya, 700 F.2d 192 (5th Cir. 1983) (reversed the conviction based on an "Allen charge" that reminded jurors of the expense and burden of a retrial, addressed the minority views but

not the majority regarding reconsideration of opinion and inquired into the count of the jurors relative to guilt or innocence); United States v. Jenkins, supra, (conviction reversed on the judge's statement to the jury during deliberation, "You have got to reach a decision in this case.", as coercive in context and under all circumstances); Jones v. Norwell, 472 F.2d 1185 (6th Cir. 1973) (conviction reversed on invasion of jury secrecy by judge's identification of the deadlocked jury's majority count, a coercive jury charge which emphasized the jury's duty to reach a verdict and a caution that they were the only twelve people who could do so, and the speedy return of the verdict subsequent to the charge[4]).

---

4 Five minutes. Jones v. Norwell, supra at 1185.

Although the language of the instruction herein is not in itself coercive such that it would infect the fundamental fairness and due process of the trial, it must be viewed in connection with the judge's inquiry into the opinion of the jurors on the benefits of further deliberation. Generally, a judge's inquiry into the extent of the jury's numerical division is reversible error. Brasfield v. United States, supra; United States v. Chanya, supra; Jones v. Norwell, supra. But these cases reflect on inquiry regarding guilt or innocence with the results made known in open court. The instant case is distinguished because the inquiry was not about guilt or innocence, nor life or death, but simply whether or not further deliberations would be beneficial. The jury in both instances was removed from

the courtroom before the results were made known. It cannot be assumed that the minority juror(s) were voting for life. The juror(s) responding "no" could have been discouraged by the discussions although himself voting for death. It is impossible to ascertain from the record what the division represented. In retrospect, it must be remembered that this jury was reflecting on seven days of evidence of the violent deaths of five people. Plus it had to review this evidence to decide whether or not to impose a sentence of life or death for the murder of three victims. The five verdicts which included two verdicts of the lesser included offense of manslaughter indicated that this jury carefully considered the evidence which would support each element of the crime. It is not surprising then that such a

careful jury would again meticulously consider whether a life or death sentence should be imposed for each of the first degree murder convictions. Since the inquiry here differs from the inquiry banned by Brasfield, supra, it is not per se error.

Several Federal Circuits have held that the per se error rule of a judge's inquiry into the numerical breakdown of a deadlocked jury does not apply on review of state court instructions, see William v. Parke, supra; Locks v. Sumner, 703 F.2d 403, 405-07 (9th Cir. 1983) (citing United States ex rel. Kirk v. Director of Corrections, 678 F.2d 723 (7th Cir. 1982); Cornell v. State of Iowa, 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126, 101 S.Ct. 944, 67 L.Ed.2d 112 (1981); Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979), cert. denied, 444 U.S. 973,

100 S.Ct. 468, 62 L.Ed.2d 388 (1979)). The inquiry made here is unlike the ones made in the aforementioned cases since it asked whether or not further deliberations would be beneficial. Under the totality of the circumstances this inquiry combined with the supplemental charge was innocuous and did not infect the fundamental fairness and due process of the trial such that the constitutional rights of petitioner were violated. In fact, the record reflects that the trial court was cautious to preserve the rights of petitioner to a fair and impartial jury trial. Thus, he consulted the prosecutor and defense attorney regarding the method for handling juror questions during deliberation and these procedures, complained about on collateral review, were stipulated to by defense counsel. (J.A. 52).

D. Louisiana Law

Finally, petitioner continually emphasizes the length of jury deliberations and their expression of distress. Eight hours deliberation after seven days of trial to decide a life or death sentence is not excessive deliberation. Moreover, under Louisiana law, the trial judge is the one who determines when a jury is hung for purposes of the applicable statute, La. Code Crim. Proc. Ann. Art. 905.8 (West 1984). The petitioner must show an abuse of discretion by the trial judge to warrant reversal. As in the instant case there is no abuse of discretion, nor did the Louisiana Supreme Court find an abuse of discretion. State v. Lowenfield, 495 So.2d 1215 (La. 1985). In its opinion the Louisiana Supreme Court addressed three issues:

1) Whether the trial judge should have declared a mistrial when the jury had difficulty in reaching a decision;

2) Whether the judge coerced the jury into returning a verdict by recharging them as to the effect of a hung jury and sending them back in to deliberate;

3) Whether the jury was allowed to deliberate too long.

On each issue the Court found that there was no abuse of discretion on the part of the judge emphasizing that the recharging was at their request.

E. There Was No Violation Of The Sixth And Fourteenth Amendments

The issues herein deal with whether or not the petitioner's Sixth Amendment

right to a fair and impartial jury and his Fourteenth Amendment right to Due Process were violated. Under the Sixth Amendment, petitioner has no right to a trial by jury in the penalty phase of his bifurcated trial. Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). Although it is permissible that a capital scheme allow a judge to impose the penalty, Louisiana has given that responsibility to the jury. La.Code Crim. Proc. Ann. art. 905.1. Thus any jury coercion by instruction or polling in the conduct of the trial would be a matter of state procedural law.

The Louisiana Supreme Court reviewed both phases of petitioner's trial and found no error in the instructions and polling. State v. Lowenfield, 495 So.2d at 1259. In the course of deciding that petitioner was not deprived of his right

to a fair and impartial jury under state law, the Louisiana Supreme Court stated that it was "not error for the court to impress upon them the importance of the case, urge them to come to agreement, and send them back for further deliberations." Ibid.

But under certain circumstances, the Due Process Clause will protect those rights given to a person by the state. In Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) this Court held that where state law creates for the defendant a liberty interest in having the jury make particular findings, the Due Process Clause implies that appellate findings do not suffice to protect that entitlement. Hence the jury instruction and/or inquiry must be reviewed within the purview of the Due Process Clause.

A review of the transcript of the hearing reveals that the judge's instruction and inquiry did not remove from the jury its burden to arrive at a verdict, or not arrive at a verdict. The judge instructed the jurors in each instance that he would impose life if they were unable to reach a unanimous verdict. Further instructions were at the jury's request. At no time did the judge take any responsibility from it.

Moreover, the judge's inquiry was not intrusive to the jury's count on life/death, nor was the count made before the jurors such as to embarrass or coerce them.

These actions of the trial judge satisfied the "twin objective" of "measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 110-11, 102 S.Ct.

869, L.Ed.2d 1 (1982); Spaziano v. Florida, 468 U.S. at 459-460. Under Due Process, the death penalty must be administered in a way that rationally distinguishes from the many criminal defendants those for whom death is an appropriate penalty. Zant v. Stephens, 462 U.S. 862, 873-880. At the same time, the sentencing scheme must be based on facts and circumstances of the individual and the crime. Lockett v. Ohio, 438 U.S. 586, 601-605. Petitioner's sentencing hearing preserved these two objectives and his rights under Due Process. Moreover, as previously discussed in this argument, the substance of the instruction and the polling were not per se error.

Conclusion

After a review of the facts as reflected in the record herein and

considering the applicable law it is clear that the jury charges and polling did not violate the constitutional standards mandated by the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT II

Petitioner's Death Sentence, Based On A Sole Statutory "Aggravating" Circumstance That Merely Repeats An Element Of The Crime, Does Not Violate The Eighth Amendment Requirement That Sentencer Discretion Be Directed And Limited So As To Minimize The Risk Of Arbitrary And Capricious Executions.

Petitioner claims that since the single aggravating circumstance relied upon at the penalty phase fails to narrow the class of death eligible persons, Louisiana's Capital Scheme suffers from the same infirmity as the discretionary sentencing statutes invalidated by this Court in Furman v. Georgia, 408 U.S. 238 (1972).

Additionally, petitioner argues that the capital sentencing procedure failed to provide a rational basis for the jury to distinguish those cases where the death penalty is imposed from those where it is not for the same offense. Finally, petitioner proposes that Louisiana's capital sentencing scheme avoids an individualized deliberative process as mandated by prior decisions of this Court.

A. Louisiana's Statutory Capital Scheme

In 1982, Louisiana's Criminal Code, La. Rev. Stat. Ann. §14, (West 1982), included four grades of homicide: First Degree Murder, Second Degree Murder, Manslaughter and Negligent Homicide.[5]

---

5 The Louisiana statutes are delineated in full in the appendix to this brief.

Second Degree Murder is the statute which represents the so called "intentional" murder or a non-intentional murder committed in the course of certain enumerated crimes. A majority of murders fall within this classification and the sentence for intentional killing is life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. But Louisiana has chosen to narrow the class of homicides eligible for the death penalty at the definitional stage with the First Degree Murder Statute. In 1982, there were four categories[6] which limited those eligible for a conviction of First Degree Murder and thereby eligible for the death penalty.

After a conviction of First Degree Murder, a defendant is exposed to a

---

6 See La.R.S. 14:30 in the Appendix.

sentence of life imprisonment without benefit of parole, probation or suspension of sentence or death. Thereafter a sentencing hearing is held according to the guidelines established by La. Code Crim. Proc. Ann. art. 905 et seq.[7] These articles direct that the hearing focus on the circumstances of the offense and the character and propensities of the offender. The jury may also consider any evidence offered at the trial on the issue of guilt. The jury must find beyond a reasonable doubt that at least one statutory circumstance exists from the list enumerated in La. Code Crim. Proc. Ann. art. 905.4 in order to recommend death. It does so after considering any mitigating circumstances, a list of which is found in La. Code Crim. Proc. art. 905.5.

---

7 See Appendix to petitioner's brief.

Mitigating evidence submitted at the hearing is not limited to those enumerated in the Article. In Louisiana, the jury is not required to weigh the mitigating circumstances against the aggravating circumstances but only to "consider" them.

A death sentence can only be imposed upon the unanimous recommendation of the jury. Life imprisonment can also be imposed by the unanimous recommendation but if the jury cannot agree upon a sentence then the court shall sentence defendant to life imprisonment without benefit of parole, probation or suspension of sentence, La. Code Crim. Proc. art. 905.8.

If the jury returns a sentence of death that sentence is automatically reviewable for excessiveness by the Supreme Court of Louisiana. Id., 905.9.

Louisiana's statutes provide all safeguards mandated by the Eighth and Fourteenth Amendments of the United States Constitution to ensure that the death penalty is not imposed in an arbitrary and capricious manner.

B. Constitutional Guidelines For Capital Sentencing Schemes Delineated by The United States Supreme Court Since Furman v. Georgia.

This Court stated in Furman v. Georgia, 408 U.S. 238 (1972), that because of the uniqueness of the death penalty, it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In response to the dictates of Furman the states enacted statutory schemes which redefined crimes for which

the death penalty was available and sentencing schemes to govern the decision of whether or not to impose death. This Court's opinions since Furman dealing with the constitutionality of various state death penalty schemes have established guidance for the inquiry herein.

In Jurek v. Texas, 96 S.Ct. 2950 (1976), this Court approved Texas's capital sentencing scheme whereby the statutory aggravating circumstances are contained within the definition of the crime. Thus when murder occurs in one of the five circumstances[8] detailed in the

---

8 Five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee. See Tex. Penal Code §19.03 (1974).

statute and a conviction is had, the death penalty must be imposed if the jury makes the enumerated additional findings against defendant. The Texas statute differs from those in other states by placing the aggravating circumstances at the definitional stage of the crime thereby narrowing those alleged murders even eligible for the death penalty. Whereas some states have chosen to maintain the traditional specific intent homicide statute and use the aggravating circumstances at the penalty phase to narrow the class of convicted murderers eligible for death, Texas and Louisiana have chosen otherwise.

In Louisiana any specific intent homicide, or non intentional homicide committed in the course of the enumerated crimes, which does not include an aggravating circumstance enumerated in

the First Degree Murder Statute, qualifies as a Second Degree Murder, La. Rev. Stat. Ann. §14:30.1, a conviction for which only life imprisonment without benefit of parole, probation or suspension of sentence is available. As in Texas, the death penalty in Louisiana is an available sentencing option--even potentially--for a smaller class of murders than in other states. Jurek, 96 S.Ct. 2956.

After a conviction for a capital murder both Texas and Louisiana provide a sentencing hearing. At the sentencing hearing in Texas three questions are asked which must be answered "yes" beyond a reasonable doubt to impose a death sentence. If the jury answers "no" to any question then life imprisonment results. Jurek, 96 S.Ct. 2955.

Of concern to this Court in Jurek, supra, was that the capital sentencing system, in order to meet the requirements of the Eighth and Fourteenth Amendments, must allow the sentencing authority to consider mitigating circumstances. Jurek, 96 S.Ct. at 2956. Texas's capital sentencing scheme was held constitutional since this Court found the defendant in Texas was allowed to introduce any relevant evidence in mitigation in response to the second statutory question. Thus providing the sentencing authority a basis to consider not only why a death sentence should be imposed but also why it should not be imposed.

Likewise, Louisiana's sentencing hearing, although not structured by specific questions as in Texas, allows the introduction of relevant evidence on mitigating circumstances. In fact, the

judge reads and gives a list[9] of mitigating circumstances to the jury for consideration. There is no mandate in Louisiana's scheme that the jury must weigh the mitigating against the aggravating circumstances. But death can only be imposed after jury consideration of both and based on at least one aggravating circumstance found beyond a reasonable doubt. Whether or not the aggravating circumstance found at the penalty phase repeats one element of the crime in the guilt phase does not violate the Eighth and Fourteenth amendments under Jurek since the sentencing jury is allowed to consider relevant evidence in mitigation.

Furthermore, Louisiana's capital sentencing scheme is basically similar to

---

9 La. Code Crim. Proc. Art. 905.5.

Texas' because the aggravating circumstances are found at the definitional stage. The sentencing phase of each provides both the State and the defendant an opportunity to further focus on the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. Gregg v. Georgia, 428 U.S. 153, 191, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976

On the same day that Jurek, supra, was decided this Court issued Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), in which it declared North Carolina's first degree murder statute, which mandated the death penalty upon conviction, unconstitutional. There were three basis for the decision that the Eighth and Fourteenth Amendments were violated:

1. The common law practice of imposing a death sentence upon every person convicted of a specified offense. Woodson v. North Carolina, 428 U.S. at 300.

2. Withdrew all sentencing discretion from jury. Id., at 301.

3. Failed to allow particularized consideration of relevant aspects of the character and record of a convicted defendant before imposing a sentence of death. Id., at 302.

Not only does Louisiana not have a mandatory death penalty but also its capital scheme does not violate the second and third criteria aforementioned.

A third capital case, decided the same day, was Gregg v. Georgia, 428 U.S. 153, at 191, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In Gregg, supra, this Court established several criteria for a capital scheme that would be within the purview of the Eighth and Fourteenth Amendments.

Gregg, repeated Furman's mandate that where discretion is afforded a sentencing body on whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Gregg further states that a bifurcated system, that allows a jury to have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, is more likely to insure elimination of arbitrary and capricious imposition of sentence. Louisiana has a bifurcated capital system. At the sentencing phase evidence not admissible at the guilt phase is admissible but limits are placed on the aggravating evidence within the guidelines of La. Code Crim. Proc. Ann. art. 905.4. The

defendant is given a broad range of admissible evidence by La. Code Crim. Proc. Ann. art. 905.5 (h): "Any other relevant mitigating circumstances."

Gregg, 428 U.S. at 189, also repeated the mandate in Woodson, 428 U.S. at 304, that the death sentencing scheme should focus on the character and record of the individual offender and the circumstances of the particular crime. Louisiana's sentencing scheme satisfies this constitutional criteria as well as Gregg's mandate that "the discretion to be exercised is controlled by clear and objective standards so as to produce non discriminatory application". Gregg, 96 S.Ct. at 2936.

Louisiana provides for a check on the non discriminatory application of the death penalty by mandating direct, automatic review of all death sentences

by the Supreme Court of Louisiana. La. Code Crim. Proc. Ann. art. 905.9. Gregg, 96 S.Ct. at 2937. According to the Rules of the Louisiana Supreme Court, it conducts a proportionality review of every death sentence to determine whether or not the sentence is disproportionate to the penalty imposed, considering both the offense and the offender. First that Court reviews defendant's personal history including his family background, criminal history, educational background and any psychological evaluations. Then the Court reviews the offense itself, after which it compares the imposition of the death penalty with similar cases where the death penalty was imposed. It reviews these phases to determine whether or not the sentence was imposed as a result of passion, prejudice or other arbitrary factors, the evidence supports

the jury's findings of the aggravating circumstance(s) and the sentence is disproportionate to the penalty imposed in similar cases, considering the crime and the defendant. See: State v. Lowenfield, 495 So.2d 1245, 1260-61 (La. 1985).

This Honorable Court further held, in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), that a death sentence based on the ground that the offenses were "outrageously or wantonly vile, horrible or inhuman", violated the Eighth and Fourteenth Amendments since the Georgia Supreme Court adopted such a broad and vague construction of the death sentence statute. In so holding, this Court repeated that a state must tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of

the death penalty. Part of the State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless discretion", Godfrey, 100 S.Ct. at 1764.

> "It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance', and that 'make rationally reviewable' the process for imposing a sentence of death."

Id. at 1765.

Louisiana's capital scheme sets standards through aggravating circumstances. Despite the fact that some of the aggravating circumstances in the penalty phase repeat elements of the underlying crime those aggravating circumstances represent the minimum standard, if found beyond a reasonable doubt, to impose the death penalty. But this minimum standard

is considered with the factors as listed in La. Code Crim. Proc. Ann. art. 905.5, in the decision whether or not to impose death. Hence Louisiana's sentencing hearing offers to the jurors clear and objective standards for discretion as required in Godfrey, supra.

The opinion in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), while determining that a death sentence was not constitutionally impaired by invalidating one of several statutory aggravating circumstances, concluded that the Georgia scheme where the aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who are eligible for the death penalty did not violate the Constitution. The Georgia scheme provides for categorically narrowing at the definitional stage, and

for individualized determination and appellate review at the selection stage and this structure is constitutional. Zant, 462 U.S. at 879.

Lowenfield's capital conviction was based on a single aggravating circumstance which was found at the definitional stage. Thereafter, he was sentenced to death based on the same sole aggravating circumstance which was identified in writing but only after reconsidering the evidence from trial and any mitigating circumstances. Although some discretion was still afforded to the jury, this Court has found that the sentencing scheme must still include discretion as long as it is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action". Zant v. Stephens, Id., at 874; Barclay v. Florida, 463 U.S.

951, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983).

Besides a list of possible mitigating circumstances to review plus any evidence offered by Lowenfield and a list of the statutory aggravating circumstances, the sentencing jury had the instructions from the judge that if it could not reach a unanimous verdict he would impose life imprisonment without benefit of parole, probation or suspension of sentence. These clear and objective standards at the sentencing hearing are sufficient to protect the defendant from an arbitrary and capricious imposition of the death sentence. Moreover, the imposition of the death sentence was reviewed by the Louisiana Supreme Court for any violation of the constitutional standards of the Eighth Amendment.

The Louisiana capital scheme satisfies the limitations imposed by the Court in its opinions since Furman. The fact that the defendant was sentenced to death based on a single aggravating circumstance that repeats the element of the underlying crime is a peculiar feature of this case. The peculiarity of this crime is that defendant killed five members of a family, three generations, including a four year old child. A death sentence is not disproportionate to this crime despite the fact that only one aggravating circumstance was found beyond a reasonable doubt.

C. STANDARD OF REVIEW

This Court presumes the validity of a punishment selected by a democratically elected legislature against the constitutional measure. The

constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment is weighed heavily. See Gregg v. Georgia, 96 S.Ct., at 2926. The Court in Gregg, ibid, further stated:

> "The deference we owe to the decisions of the state legislatures under our federal system, 408 U.S., at 465-470, 92 S.Ct., at 2842-2844 (Rehnquist, J., dissenting), is enhanced where the specification of punishments is concerned, for 'these are peculiar questions of legislative policy". Gore v. United States, 357 U.S. 386, 393, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405 (1958). Cf. Robinson v. California, 370 U.S., at 664-665, 82 S.Ct., at 1419-1420; Trop v. Dulles, 356 U.S., at 103, 78 S.Ct., at 599 (plurality opinion); In re Kemmler, 136 U.S, at 447, 10 S.Ct., at 933.

Since Louisiana's capital scheme does not offend any of the constitutional standards established by this Court and the substantive elements at issue herein

do not violate the Eighth or Fourteenth Amendments, this Court should affirm petitioner's death sentence as decided by the jury.

D. Federal Appellate Courts

The Eighth Circuit's decision in Collins v. Lockhart, 754 F.2d 258 (1985) is seemly contrary to respondent's position herein. But the Eighth Circuit's rationale is premised on a standard that is not mandated by this Court's constitutional analysis. In Collins, supra, the convicted robber-murderer was sentenced to death based on three aggravating circumstances one of which was for "pecuniary gain". The Court held that since pecuniary gain merely duplicated an element of robbery it cannot be used to perform the narrowing function for sentencing. It

based its conclusion on the following interpretation:

> "An aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime."

Collins, 754 F.2d at 264.

The aggravating circumstance provides the narrowing function that distinguishes a death eligible defendant from those who commit similar crimes. If murder is the underlying crime then all murderers who intentionally kill during a robbery would be eligible for the death penalty. What then distinguishes those who are death eligible from those who actually receive a death sentence are the mitigating and aggravating circumstances considered at the sentence hearing. Once the narrowing of death eligible criminals

is performed by statute then the clear and objective standards to guide the discretion of the sentences become effective.

Moreover, the Eighth Circuit proposes that had Arkansas defined any deliberate, premeditated murder as capital felony murder, and then prescribed the commission of that murder for pecuniary gain as one of the statutory aggravating circumstances, no one could claim that double counting had occurred. Collins, at 265. What the Eighth Circuit has done is reject the narrowing of death eligible crimes at the definitional stage which has been held by this Court to be constitutional. See Jurek v. Texas, supra.

The Fifth Circuit in Welcome v. Blackburn, 793 F.2d 672 (5th Cir. 1986), noted that the Louisiana Supreme Court

has held that a jury is not compelled to find an aggravating circumstance was present merely because it found the accused guilty of murder, State v. Knighton, 436 So.2d 1141 (1983). Louisiana does not enforce the sort of mandatory death penalty condemned in Woodson v. North Carolina, supra.

The Fifth Circuit in Welcome v. Blackburn, at 677, summed up the argument:

> "Welcome's charge that because Louisiana statutory scheme duplicates an aggravating circumstance in the underlying crime, it unconstitutionally fails to narrow the class of persons qualifying for the death sentence is sophistical. By classifying first degree murder as including certain aggravating circumstances the state has narrowed the class of those subject to the death penalty as effectively as if it allowed a broader class to be convicted but then limited those within the broader class who could be sentenced to death

> to only persons whose crimes are accompanied by specific aggravating circumstances."

Conclusion

Louisiana's capital scheme where the imposition of the death penalty can be based on a single aggravating circumstance which merely repeats the element of the crime does not violate the limitations imposed by the Eighth and Fourteenth Amendments.

CONCLUSION

Since petitioner's sentencing hearing was not coercive and unfair and the death sentence, based on a sole aggravating circumstance which repeated an element of the underlying crime, did not violate the Eighth and Fourteenth Amendments, this Court should affirm the imposition of the sentence of death.

Respectfully Submitted,

WILLIAM J. GUSTE, JR
ATTORNEY GENERAL
STATE OF LOUISIANA
234 LOYOLA AVENUE
SUITE 700
NEW ORLEANS, LOUSIANA
70112

JOHN M. MAMOULIDES
DISTRICT ATTORNEY
24TH JUDICIAL DISTRICT
PARISH OF JEFFERSON
STATE OF LOUISIANA

DOROTHY A. PENDERGAST*
ASSISTANT DISTRICT ATTORNEY
RESEARCH & APPEALS
NEW COURTHOUSE ANNEX
GRETNA, LOUISIANA 70053
TELEPHONE: (504) 368-1020
Counsel for Respondent

*Counsel of Record

STATUTORY APPENDIX

Louisiana Code of Criminal Procedures Annotated
(West 1984 & Supp. 1986)

CHAPTER 1. OFFENSES AGAINST THE PERSON

Art.

30 First Degree Murder
30.1 Second Degree Murder
31 Manslaughter
32 Negligent Homicide

Art. 30. First Degree Murder

A. First degree murder is the killing of a human being:

(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve years. Pursuant to Acts 1985.

B. For the purposes of Paragraph (A)(2) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

C. Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

Amended by Acts 1973, No. 109 §1; Act. 1975, No. 327, §1; Acts 1976, No. 657, §1; Acts 1979, No. 74, §1, eff. June 9, 1979; Acts 1985, NO. 515, §1. Amendment attached.

Art. 30.1 Second Degree Murder

Second degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard

labor without benefit of parole, probation, or suspension of sentence.

Added by Acts 1973, No. 111, §1. Amended by Acts 1975, No. 380, § 1; Acts 1976, No. 657, §2; Acts 1977, No. 121, §1; Acts 1978, No. 796, §1; Acts 1979, No. 74, §1, eff. June 29, 1979.

Art. 31. Manslaughter

Manslaughter is:

(1). A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or than an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years.

Amended by Acts 1973, No. 127, § 1.

Art. 32. Negligent homicide

Negligent homicide is the killing of a human being by criminal negligence.

The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence.

Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both.

Amended by Acts 1980, No. 708, §1.

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

In the Supreme Court of the United States

OCTOBER TERM, 1987

LESLIE LOWENFIELD, PETITIONER

v.

C. PAUL PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will address the following question:

Whether the trial court's inquiry about the usefulness of further deliberations by the jury and the court's subsequent use of an *Allen* charge had a coercive effect on the jury.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
The trial court did not coerce the jury into returning a capital sentence	9
A. The trial court's *Allen* charge was not coercive	10
1. The *Allen* charge serves legitimate purposes and is not inevitably coercive	10
2. The supplemental jury instruction given by the trial court in this case was not coercive	17
B. Polling the jury to determine the utility of further deliberations, even in conjunction with the modified supplemental *Allen* charge, was not coercive	24
Conclusion	31
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, 164 U.S. 492 (1896)	8, 11, 12, 13, 23, 1a
Andrews v. *United States*, 309 F.2d 127 (5th Cir. 1962)	15, 23
Arizona v. *Washington*, 434 U.S. 497 (1978)	28
Ballew v. *Georgia*, 435 U.S. 223 (1978)	13
Beale v. *United States*, 263 F.2d 215 (5th Cir. 1959)	27
Berger v. *United States*, 62 F.2d 438 (10th Cir. 1932)	19

Cases—Continued: Page

Bowen v. *United States*, 153 F.2d 747 (8th Cir.), cert. denied, 328 U.S. 835 (1946) 27
Brasfield v. *United States*, 272 U.S. 448 (1926) ..8, 24, 25, 26, 30
Burton v. *United States*, 196 U.S. 283 (1905) 24
Butler v. *United States*, 254 F.2d 875 (5th Cir. 1958) 27
Cabana v. *Bullock*, 474 U.S. 376 (1986) 21
California v. *Brown*, No. 85-1563 (Jan. 27, 1987) .. 18
Carlton v. *United States*, 395 F.2d 10 (9th Cir. 1968), cert. denied, 393 U.S. 1030 (1969) 27
Cornell v. *Iowa*, 628 F.2d 1044 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981) 25
Ellis v. *Reed*, 596 F.2d 1195 (4th Cir.), cert. denied, 444 U.S. 973 (1979) 25
Estes v. *Texas*, 381 U.S. 532 (1965) 13
Fields v. *State*, 487 P.2d 831 (Alaska 1971) 18
Fulwood v. *United States*, 369 F.2d 960 (D.C. Cir. 1966), cert. denied, 387 U.S. 934 (1967) 30
Gafford v. *Warden*, 434 F.2d 318 (10th Cir. 1970) 27
Green v. *United States*, 309 F.2d 852 (5th Cir. 1962) 15
Hicks v. *Oklahoma*, 447 U.S. 343 (1980) 21
Hovey v. *Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) 14
Huffman v. *United States*, 297 F.2d 754 (5th Cir. 1962) 15
Hyde v. *United States*, 225 U.S. 347 (1912) 12-13, 23
Jenkins v. *United States*, 380 U.S. 445 (1965) 19
Jones v. *Norvell*, 472 F.2d 1185 (6th Cir.), cert. denied, 411 U.S. 986 (1973) 25
Kawakita v. *United States*, 343 U.S. 717 (1952), aff'g, 190 F.2d 506 (9th Cir. 1951) 12, 13
Lias v. *United States*, 284 U.S. 584, aff'g 51 F.2d 215 (4th Cir. 1931) 12, 13
Locks v. *Sumner*, 703 F.2d 403 (9th Cir.), cert. denied, 464 U.S. 933 (1983) 25
Mayfield v. *State*, 302 Md. 624, 490 A.2d 687 (1985) 26

Cases—Continued: Page

Marsh v. *Cupp*, 392 F. Supp. 1060 (D. Or. 1975), aff'd, 536 F.2d 1287 (9th Cir.), cert. denied, 429 U.S. 981 (1976) 25
McElroy v. *United States*, 164 U.S. 76 (1896) 30
Muhammad v. *State*, 243 Ga. 404, 254 S.E.2d 356 (1979) 26
Parker v. *Gladden*, 385 U.S. 363 (1966) 13
People v. *Carter*, 68 Cal. 2d 810, 442 P.2d 353, 69 Cal. Rptr. 297 (1968) 25-26
People v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974) 26
Potter v. *United States*, 691 F.2d 1275 (8th Cir. 1982) 16, 23
Profitt v. *Florida*, 428 U.S. 242 (1976) 21
Rose v. *Clark*, No. 84-1974 (July 2, 1986) 30
Sanders v. *United States*, 415 F.2d 621 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970) 27
Sheppard v. *Maxwell*, 384 U.S. 333 (1966) 13
Singer v. *United States*, 380 U.S. 24 (1965) 13-14
Spaziano v. *Florida*, 468 U.S. 447 (1984) 21
State v. *Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984) 26
State v. *Rickerson*, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845 (1981) 26
State v. *Roberts*, 131 Ariz. 513, 642 P.2d 858 (1982) 26
State v. *Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959) 18
Strickland v. *Washington*, 466 U.S. 668 (1984) 15
Thaggard v. *United States*, 354 F.2d 735 (5th Cir. 1965) 15
Turner v. *Louisiana*, 379 U.S. 466 (1965) 13
United States v. *Akbar*, 698 F.2d 378 (9th Cir.), cert. denied, 461 U.S. 959 (1983) 26
United States v. *Allis*, 73 F. 165 (E.D. Ark. 1893), aff'd, 155 U.S. 117 (1894) 11
United States v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973) 16, 20, 23
United States v. *Brown*, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970) 13, 15

Cases—Continued: Page

United States v. *Burke*, 700 F.2d 70 (2d Cir.), cert. denied, 464 U.S. 816 (1983) 16
United States v. *Buttorff*, 572 F.2d 619 (8th Cir. 1978) 15
United States v. *Cook*, 663 F.2d 808 (8th Cir. 1981) 26
United States v. *Dawkins*, 562 F.2d 567 (8th Cir. 1977) 23
United States v. *Diggs*, 522 F.2d 1310 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1976) 26-27
United States v. *Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972) 15
United States v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973) 15
United States v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969) 15, 16, 18
United States v. *Flannery*, 451 F.2d 880 (1st Cir. 1971) 18
United States v. *Goldstein*, 479 F.2d 1061 (2d Cir.), cert. denied, 414 U.S. 873 (1973) 28
United States v. *Graham*, 758 F.2d 879 (3d Cir.), cert. denied, 474 U.S. 901 (1985) 28
United States v. *Harris*, 391 F.2d 348 (6th Cir.), cert. denied, 393 U.S. 874 (1968) 19-20
United States v. *Hasting*, 461 U.S. 499 (1983) 30
United States v. *Jennings*, 471 F.2d 1310 (2d Cir.), cert. denied, 411 U.S. 935 (1973) 27
United States v. *Kahaner*, 317 F.2d 459 (2d Cir.), cert. denied, 375 U.S. 836 (1963) 19, 20
United States v. *Kelly*, 783 F.2d 575 (5th Cir. 1986), cert. denied, No. 86-5429 (Oct. 14, 1986) .. 16
United States v. *Lane*, 474 U.S. 438 (1986) 30
United States v. *Mack*, 249 F.2d 321 (7th Cir. 1957), cert. denied, 356 U.S. 920 (1958) 27
United States v. *McKinney*, 822 F.2d 846 (10th Cir. 1987) 16
United States v. *Moylan*, 417 F.2d 1002 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970) 15
United States v. *Rao*, 394 F.2d 354 (2d Cir.), cert. denied, 393 U.S. 845 (1968) 27

Cases—Continued: Page

United States v. *Rengifo*, 789 F.2d 975 (1st Cir. 1986) 26
United States v. *Rey*, 811 F.2d 1453 (11th Cir. 1987), petition for cert. pending, No. 86-2060 16
United States v. *Rogers*, 289 F.2d 433 (4th Cir. 1961) 27
United States v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984) 27
United States v. *Sawyers*, 423 F.2d 1335 (4th Cir. 1970) 14, 16, 18, 27
United States v. *Scott*, 547 F.2d 334 (6th Cir. 1977) 16, 19
United States v. *See*, 505 F.2d 845 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975) 27
United States v. *Silvern*, 484 F.2d 879 (7th Cir. 1973) 16, 19
United States v. *Smith*, 635 F.2d 716 (8th Cir. 1980) 23
United States v. *Smoot*, 463 F.2d 1221 (D.C. Cir. 1972) 27
United States v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) 14, 15, 16, 18, 19
United States v. *Warren*, 594 F.2d 1046 (5th Cir. 1979) 26
United States ex rel. Anthony v. *Sielaff*, 552 F.2d 588 (7th Cir. 1977) 27, 28
United States ex rel. Kirk v. *Director, Dep't of Corrections*, 678 F.2d 723 (7th Cir. 1982) 25
United States ex rel. Webb v. *Court of Common Pleas*, 516 F.2d 1034 (3d Cir. 1975) 28
Wainwright v. *Witt*, 469 U.S. 412 (1985) 18
White v. *United States*, 279 F.2d 740 (4th Cir.), cert. denied, 364 U.S. 850 (1960) 20
Williams v. *Parke*, 741 F.2d 847 (6th Cir. 1984), cert. denied, 470 U.S. 1029 (1985) 25
Witherspoon v. *Illinois*, 391 U.S. 510 (1968) 20

Constitution:

U.S. Const. Amend. V (Due Process Clause) 25

Miscellaneous: Page

Committee on Model Criminal Jury Instructions for the Eighth Circuit, *Manual of Model Criminal Jury Instructions for the Eighth Circuit* (1985 & Supp. 1986) 16-17

Committee on Model Jury Instructions, *Manual of Model Jury Instructions for the Ninth Circuit* (1985) 16

Federal Judicial Center, *Pattern Jury Instructions* (1982) 17

H. Kalven & H. Zeisel, *The American Jury* (1966) 14

Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386 (1964) 15

Note, *On Instructing Deadlocked Juries*, 78 Yale L.J. 100 (1968) 15

Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U.L. Rev. 296 (1972) 15

ABA, Standards Relating to Trial by Jury (1968) .. 3a-4a

U.S. Eleventh Circuit District Judge Association, *Pattern Jury Instructions—Criminal Cases* (1985) 16, 1a-3a

U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* (1978) 16, 1a-3a

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6867

LESLIE LOWENFIELD, PETITIONER

v.

C. PAUL PHELPS, SECRETARY, LOUISIANA DEPARTMENT OF CORRECTIONS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

It is not uncommon for juries in federal criminal cases to have difficulty reaching a verdict or to become deadlocked at some point during their deliberations. The federal government therefore has a substantial interest in the procedures that trial courts may follow when a jury is deadlocked or otherwise reports difficulty in its deliberations. The first question in this case is whether the trial court's inquiry about the usefulness of further deliberations and the court's subsequent use of an *Allen* charge coerced the jury into returning a capital sentence. This Court's resolution of that question could affect the kinds of procedures federal and state courts are permitted to employ when such problems arise during trial, in both capital and non-capital cases.

STATEMENT

1. Petitioner was convicted in 1985 of killing a woman with whom he had lived and four members of her family. On May 14, 1985, at the conclusion of the evidence in the guilt phase of the trial, the jury deliberated from 11:45 a.m. until 7:45 p.m., at which point the jury recessed for the night (J.A. 3-4). The jury resumed its deliberations at 10:05 a.m. the next morning and returned its verdicts shortly after 3:00 p.m. (J.A. 3-4, 25-27). Petitioner was found guilty on three counts of first degree murder and two counts of manslaughter (J.A. 12).

Defense counsel moved for a 24- to 48-hour delay before commencing the sentencing phase of the trial. The trial judge denied the motion, explaining that he had "talked with the jurors for a moment to see what their mental and physical state was" and that the jurors had unanimously reported that they were physically and mentally ready to begin the sentencing phase (J.A. 28). The trial judge, however, did recess court until 6:05 p.m., when the penalty phase began (J.A. 6; see J.A. 31-43).

Shortly after 8:00 p.m., the trial court instructed the jury (J.A. 7, 43-47). The court advised the jury that if it could not reach a verdict, the court would impose a sentence of life imprisonment without parole (J.A. 46). The court then instructed the jury as follows (*ibid.*):

> When you enter the jury room it is your duty to consult with one another to consider each others views and to discuss the evidence with the objective of reaching a just verdict. If you can do so without violence to your individual judgment. Each must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You

> are not advocates for one side or the other. Do not hesitate to re-exam [*sic*] your own views and to change your opinion if you are convinced you are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Defense counsel did not object to that instruction. The jurors requested and were allowed to retire at 11:55 p.m. (J.A. 7, 15-16, 48).

The jury reconvened the next day at 9:40 a.m. (J.A. 8). At 11:45 a.m., counsel for the defense moved for a mistrial because of the length of time the jury had been out and because of an instruction given by the trial judge at the guilt phase (J.A. 8, 50-51). The trial judge denied the motion, stating that "[the jurors] are still working towards the verdict," as indicated by the jury's notes (J.A. 51). At 3:05 p.m., defense counsel reurged the motion when a note came from the foreman of the jury stating, "The jury is having great distress and is unable to reach a decision at this point. There is a great unbalance in the voting. Please call us back in and direct the jury again as to its responsibilities and the oath we took" (J.A. 17; see J.A. 51-53). The trial judge denied the mistrial motion, and instead used a procedure that the prosecution and the defense had agreed upon during a conference with the judge in chambers (J.A. 52). The jury was called back in and the following colloquy occurred (J.A. 53-54):

> THE COURT: Mr. Conzoneri [the foreman] I'd like you to answer the question that I have and I'd like you to only answer it yes or no: Does the jury have a verdict on any Count?
>
> THE FOREMAN: No, sir.

THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose a sentence of Life Imprisonment without benefit of Probation, Parole or Suspension of Sentence.

The procedure I'm going to go through is I'm going to aska [*sic*] question and I'm going to ask Mr. Conzoneri to please give me the anser [*sic*] to the question. Then I'm going to pass out pieces of paper to each juror, and I'm going to ask them to write their nam [*sic*] on the piece of paper and write your individual answer to the question on the paper. Then we'll pick that up.

The question is: I ask you if further deliberations would be helpful in obtaining a verdict.

Mr. Conzoneri, could you please answer that question.

THE FOREMAN: Yes, sir.

THE COURT: Please pass out the papers.

On those pieces of papers if you would please put down your named [*sic*] down and then if you please answer that same question: If further deliberations would be helpful in obtaining a verdict? What is your answer to that question?

The jurors wrote out their answers; eight replied in the affirmative, and four in the negative (J.A. 17, 54). The defense moved for a mistrial on the ground that the jury was unable to reach a verdict, and the trial court again denied the motion (J.A. 54-55). After collecting the jurors' responses, the judge had the jury leave the courtroom. Almost immediately, the trial judge received a note from the foreman stating that some of the jurors had misunderstood the court's question and that the jury wished to be repolled (J.A. 17, 55). The trial judge brought the

jury back into the courtroom and said the following (J.A. 55):

> THE COURT: I'm going to ask the question again.
>
> I'm going to change a couple of words of it to make it a little bit more precise. Then I'm going to pass out pieces of paper and I'm going to ask you again to write your name and answer to it.
>
> The question is: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> I'll repeat that: Do you feel that any further deliberations will enable you to arrive at a verdict?
>
> Please put your name and yes or no.

This time, the jury split 11-1 in favor of the view that further deliberations might enable it to reach a verdict (J.A. 18). The judge reinstructed the jury as the foreperson had requested (J.A. 56):

> THE COURT: Ladies and Gentlemen, as I instructed you earlier if the jury is unable to unanimously agree on a recommendation the Court shall impose the sentence of Life Imprisonment without benefit of Probation, Parole, or Suspension of Sentence.
>
> When you enter the jury room it is your duty to consult with one another to consider each other's views and to discuss the evidence with the objective of reaching a just verdict if you can do so without violence to that individual judgment.
>
> Each of you must decide the case for yourself but only after discussion and impartial consideration of the case with your fellow jurors. You are not advocates for one side or the other. Do not hesitate to reexamine your own views and to change your opinion if you are convinced you

> are wrong but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Defense counsel did not object to the poll or to the supplemental instruction.

The jury resumed its deliberations and in 30 minutes returned a verdict. Petitioner was sentenced to death on all three counts of first degree murder (J.A. 17-18, 57-58).[1]

2. On direct appeal, petitioner argued that the trial court's actions at the sentencing stage were improper, for several reasons. First, petitioner argued that the trial judge should have declared a mistrial when the jury indicated it was having difficulty reaching a verdict. The Louisiana Supreme Court rejected petitioner's argument. The court stated that a trial court is not obliged "to declare a deadlock at the first sign of trouble," and it found that in the circumstances of this case, the trial court did not abuse its discretion in allowing the deliberations to continue. *State* v. *Lowenfield*, 495 So. 2d 1245, 1259 (La. 1985), cert. denied, 476 U.S. 1153 (1986). Second, petitioner argued that the trial judge coerced the verdict from the jury. The state supreme court re-

---

[1] The exact time that the jury spent deliberating after the supplemental charge is unclear from the record. The Louisiana Supreme Court stated that it was "less than an hour." *State* v. *Lowenfield*, 495 So. 2d 1245, 1259 (La. 1985), cert. denied, 476 U.S. 1153 (1986). The federal district court and court of appeals stated that it was 30 minutes (J.A. 79, 112). The record does not indicate a precise time, but only reflects that the final deliberations took less than 55 minutes. Compare J.A. 17 (time of foreman's note stating that some jurors misunderstood the trial court's question) with J.A. 18 (time of foreman's note stating that the jury had reached a verdict).

jected that argument as well, finding that "[t]here is nothing in the record to suggest or indicate that the verdict was rendered as a result of any coercive influence by the court" (*ibid.*). The court added that it is "a well settled proposition" that a trial court may "impress upon th[e jurors] the importance of the case, urge them to come to agreement, and send them back for further deliberation" when the court learns that the jury is having difficulty in agreeing (*ibid.*). Finally, the state supreme court rejected petitioner's arguments that the jury was permitted to deliberate for an unduly long period and that the trial court should have granted a recess between the guilt and sentencing phases of the trial (*id.* at 1259-1260).

3. Petitioner then sought a writ of habeas corpus from the United States District Court for the Eastern District of Louisiana. In his petition, he reasserted his claim that the jury had been coerced into returning a capital sentence. The district court rejected that claim, finding that the totality of the circumstances did not establish coercion (J.A. 79). The court of appeals, by a divided vote, also rejected petitioner's contention (J.A. 100-126). The majority noted that petitioner did not challenge either supplemental instruction used by the trial court (J.A. 113). In any event, the court of appeals found that "there is no showing of coercion; the record certainly does not demonstrate coercion sufficient to render the trial fundamentally unfair" (*ibid.*). The dissenting judge argued that the trial court's inquiry into the jury's numerical division, combined with the supplemental charge encouraging the jury to reach a verdict, coerced the jury into returning a capital sentence (*id.* at 127-134 (Johnson, J., dissenting)).

SUMMARY OF ARGUMENT

A. For more than 90 years, this Court and every federal court of appeals have authorized federal trial judges to deliver a supplemental instruction to a deadlocked jury encouraging the jurors to consider the views of the others in an effort to reach a verdict if they could do so without abandoning their honest beliefs. See *Allen* v. *United States*, 164 U.S. 492 (1896). These instructions serve an important purpose in the criminal process, and if appropriately phrased they are not likely to coerce a jury into reaching a verdict.

A supplemental instruction encouraging each member of the jury to listen to and consider the viewpoints of his fellow jurors may be a useful means of ensuring that each juror will carry out his sworn responsibilities. Such an instruction can avoid the severe burdens on the criminal justice system that result from unnecessary retrials. Even when, as in this case, no retrial is possible, a supplemental instruction like the one given here reminds jurors of their duty to continue trying to reach a unanimous verdict if it is possible to do so without sacrificing conscientiously held beliefs.

The modified *Allen* charge used in this case was not coercive. It simply directed the jurors to listen to one another; it made clear that the jurors should not abandon their conscientiously held beliefs simply to reach a verdict; and it did not focus its attention on the jurors in the minority.

B. In *Brasfield* v. *United States*, 272 U.S. 448 (1926), this Court adopted a procedural rule for the federal courts prohibiting a trial judge from asking the jury for its numerical division when that inquiry is followed by an *Allen* charge. That rule does not

govern this case, for two reasons. First, the rule in *Brasfield* was not a constitutional rule and therefore is not applicable to state court proceedings. Second, the inquiry whether further deliberations would be helpful is materially different from an inquiry into the jury's numerical division. The former question is designed to enable a trial judge to determine whether to discharge the jury, rather than to isolate jurors in the minority. In addition, the inquiry concerning the usefulness of further deliberations is a neutral one; it does not suggest to the jury that the judge favors either party, or that the judge expects the jury to reach a verdict at all.

The principal focus in a case such as this one should be on whether the court's actions had the effect of coercing a verdict. Even if a judge improperly inquires into the division of the jury, that inquiry should be treated simply as one factor in determining whether the jury was coerced in a particular case. In this case, neither the supplemental instruction nor the trial judge's inquiry of the jurors was coercive, either standing alone or viewed in light of all the circumstances.

ARGUMENT

THE TRIAL COURT DID NOT COERCE THE JURY INTO RETURNING A CAPITAL SENTENCE

Petitioner claims (Br. 11-30) that the trial court coerced the jury into returning a capital sentence. Although petitioner relies on the totality of the circumstances in arguing that the trial court's actions were tantamount to a directed verdict, the two principal objections asserted by petitioner are (1) the trial court's use of a so-called "dynamite" or "blasting" jury charge, and (2) the court's inquiry as to whether further jury deliberations would be helpful.

These actions, petitioner argues, encroached on the jury's independence and robbed him of any chance to receive a non-capital sentence. We submit that the court's actions were consistent with the principles governing the proper management of deliberating juries and did not have the coercive effect that petitioner claims.

A. The Trial Court's *Allen* Charge Was Not Coercive

1. *The* Allen *charge serves legitimate purposes and is not inevitably coercive*

It is not uncommon for the jury in a criminal case to have difficulty reaching a unanimous verdict. When that occurs, the trial judge must decide how long to allow the jury to deliberate before declaring a mistrial. The determination is a difficult one because of the competing interests at stake. On the one hand, refusing to discharge the jury after protracted deliberations poses the risk that any ensuing verdict will be the product of exhaustion, not reason. On the other hand, a mistrial imposes considerable costs on the criminal justice system. Delay is the enemy of truth and can render a retrial difficult, if not impossible, because the memories of witnesses can fade, witnesses may decline to testify, they may move or die, and critical evidence may be lost. Nor is accuracy the only victim of delay. All the participants in the criminal justice system—judges, prosecutors, victims of crime, the community, and the persons accused of crime—have an interest in seeing the jury reach a verdict at one trial if possible.[2] Accord-

[2] The effect of retrials on the trial court is to increase the court's caseload, which inevitably delays the disposition of other cases and decreases the care with which the court can handle each of the matters before it. Retrials also increase

ingly, a procedure that can avoid unnecessary retrials serves compelling societal interests.

One such procedure is to remind the jurors, when they have difficulty reaching a verdict, of their responsibility to be open-minded and to consider the views of each juror with the objective of reaching a verdict if it is possible to do so. That practice has long been approved by the federal courts. For more than 90 years, it has been the rule in federal criminal cases that, when the jurors have difficulty reaching a verdict, the trial judge is not obliged either to declare a mistrial or to remain silent. See *United States* v. *Allis*, 73 F. 165, 182-183 (E.D. Ark. 1893), aff'd, 155 U.S. 117 (1894). Instead, the judge may encourage the jurors to reach a verdict by delivering a so-called "*Allen* charge," a jury instruction named after the decision that first expressly approved the practice, *Allen* v. *United States*, 164 U.S. 492 (1896).

---

the burden on the prosecution, which may force the prosecutor to agree to plea bargains that would otherwise be unacceptable, or to abandon some cases altogether. Delay can impair the defendant's ability to establish his innocence, and it inevitably disrupts his personal life, especially if he is in custody. Other defendants, guilty and innocent, will suffer the same burdens if their trials are postponed in order to accommodate additional retrials in other cases. Witnesses needlessly relive painful experiences, which deters voluntary cooperation with the criminal justice system and makes the victims of crime also victims of the system. The community's interest in the swift administration of justice is harmed by delay, as is society's interest in the incapacitation, rehabilitation, and deterrence of offenders. And when a person accused of a serious crime is free on bail, a delay in bringing his prosecution to a close prolongs public anxiety over community safety and increases the risk that he will commit new crimes while he is at large.

In the *Allen* case, this Court held that it was proper for a trial court to give a supplemental instruction to a deadlocked jury encouraging the jurors, particularly those in the minority, to be open-minded and to reconsider their views in light of the viewpoint of the majority, so that a definitive verdict might be reached. 164 U.S. at 501-502. An instruction of that type is valid, the Court held, since it is fully consistent with the rationale for having a jury deliberate on a defendant's guilt or innocence. As the Court explained, the verdict should represent the honest opinion of each individual juror, but it does not follow that a juror will not change his opinion in conference with the other jurors. On the contrary, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* at 501. "It certainly cannot be the law," the Court stated, "that each juror should not listen with deference to the arguments" of the other jurors "with a distrust of his own" if a majority of the other jurors disagree with him; that a juror could begin deliberations with "a blind determination that the verdict shall represent his opinion of the case at that moment;" or that a juror could "close his ears" to the views of the other jurors. *Ibid.* The instruction given in the *Allen* case did no more than advise the jury of its proper function, the Court found, and therefore was not erroneous. *Ibid.*

Since the decision in *Allen*, this Court has twice upheld convictions that were challenged on the ground that the verdict was coerced by an *Allen* charge. *Lias* v. *United States*, 284 U.S. 584 (1931), aff'g 51 F.2d 215, 218 (4th Cir. 1931); *Kawakita* v. *United States*, 343 U.S. 717, 744 (1952), aff'g 190 F.2d 506, 521-528 (9th Cir. 1951); cf. *Hyde* v.

United States, 225 U.S. 347, 381-383 (1912).[3] None of the cases cited by petitioner (Br. 12, 25), such as *Turner* v. *Louisiana*, 379 U.S. 466 (1965) (contacts between jurors and deputy sheriffs who were the principal prosecution witnesses); *Estes* v. *Texas*, 381 U.S. 532 (1965) (televised trial); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) (prejudicial publicity before and during trial); and *Parker* v. *Gladden*, 385 U.S. 363 (1966) (contacts between jurors and bailiff), has undercut the holding in *Allen*. An *Allen* charge simply does not contain the "overt coercive elements" present in those cases. *United States* v. *Brown*, 411 F.2d 930, 932 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970).

The reasoning in *Allen* is still valid today. The rationale for requiring a jury to deliberate is that joint consideration of the evidence and arguments of counsel by the entire jury, and the comparison of the viewpoints of each juror with those of his colleagues, is more likely to produce an accurate and just outcome than is simply taking a vote on the accused's guilt or innocence. Cf. *Ballew* v. *Georgia*, 435 U.S. 223, 232-234 (1978) (opinion of Blackmun, J.). A trial by jury has its "weaknesses" (*Singer* v. *United*

[3] In *Lias*, the court of appeals had upheld a supplemental instruction "substantially" similar to the *Allen* charge. 51 F.2d at 218. This Court, on writ of certiorari "limited to the question raised by the supplemental charge to the jury" (284 U.S. at 604), affirmed the lower court's judgment per curiam, simply citing the *Allen* decision. 284 U.S. at 584. In *Kawakita*, the court of appeals had upheld a supplemental charge substantially like the *Allen* instruction. 190 F.2d at 521-528. Although the use of the instruction was one of the alleged errors relied on for reversal (see Pet. Br. 160-169, *Kawakita* v. *United States*, No. 570, 1951 Term), this Court disposed of the contention by grouping it with others and saying that all were "either insubstantial or so adequately disposed of by the Court of Appeals that we give them no notice." 343 U.S. at 744.

States, 380 U.S. 24, 35 (1965)), however, and one of them is that occasionally jurors may not live up to their oaths. Some jurors are loath to assume the responsibility of deciding another person's fate and prefer to avoid the obligation to decide the case before them. Some jurors may disregard their duty to consider the arguments of others. Other jurors, after having once expressed their views about the case during deliberations, may find it difficult—due to pride or obstinacy—to withdraw from their position, even if they later come to believe, on the basis of arguments made by other jurors, that their original position is no longer defensible. By reminding jurors of their duty to consider the views of their colleagues and to decide the case, if they can do so without sacrificing their conscientiously held views, an *Allen* charge can meet these and similar contingencies and avoid the costs associated with an unnecessary retrial.[4]

It is no ground for objecting to an *Allen* charge that the charge may deny a defendant the benefits of a hung jury. *United States* v. *Sawyers*, 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *United States* v. *Thomas*, 449 F.2d 1177, 1190 (D.C. Cir. 1971) (en banc) (Robb, J., dissenting) ("Agreement on a verdict ought to be encouraged, for the very purpose and function of a jury is to decide issues of fact, not to engage in inconclusive debate."). It is true, of course, that a hung jury can benefit a defendant, and

---

[4] The available evidence suggests that the process of reaching consensus is frequently a difficult one. While juries ultimately reach agreement in more than 90% of criminal cases, jurors apparently disagree on the first ballot in approximately two-thirds of all criminal trials. *Hovey* v. *Superior Court*, 28 Cal. 2d 1, 25-26, 616 P.2d 1301, 1313-1314, 168 Cal. Rptr. 128, 140-141 (1980); H. Kalven & H. Zeisel, *The American Jury* 488 (1966).

every juror certainly has the power to refuse to return a guilty verdict in the teeth of overwhelming evidence. But just as a defendant has no entitlement to a "lawless" jury (*Strickland* v. *Washington*, 466 U.S. 668, 695 (1984)), or to have the jury told that it may refuse to convict him notwithstanding clear proof of his guilt,[5] so too a defendant has no protected interest in a hung jury that could be undermined by an *Allen* charge.

To be sure, the *Allen* charge has been the object of criticism by the lower federal courts and commentators on the ground that it is potentially coercive.[6] To avoid that problem, some courts of appeals, in the exercise of their supervisory powers, have approved variants on the original *Allen* charge. The different formulations approved by the courts of appeals are

---

[5] See, *e.g.*, *United States* v. *Buttorff*, 572 F.2d 619, 627 (8th Cir. 1978); *United States* v. *Dougherty*, 473 F.2d 1113, 1130-1137 (D.C. Cir. 1972); *United States* v. *Dellinger*, 472 F.2d 340, 408 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); *United States* v. *Moylan*, 417 F.2d 1002, 1005-1007 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

[6] See, *e.g.*, *Huffman* v. *United States*, 297 F.2d 754, 756-759 (5th Cir. 1962) (Brown, J., concurring in part and dissenting in part); *Andrews* v. *United States*, 309 F.2d 127, 129-130 (5th Cir. 1962) (Wisdom, J., dissenting); *Green* v. *United States*, 309 F.2d 852, 854 n.3 (5th Cir. 1962); *Thaggard* v. *United States*, 354 F.2d 735, 739-741 (5th Cir. 1965) (Coleman, J., concurring); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970); *United States* v. *Fioravanti*, 412 F.2d 407, 415-420 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); see also Note, *On Instructing Deadlocked Juries*, 78 Yale L.J. 100 (1968); Note, *Deadlocked Juries and Dynamite: A Critical Look at the "Allen Charge"*, 31 U. Chi. L. Rev. 386 (1964); see generally Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U.L. Rev. 296, 314 (1972).

each designed to avoid some of the features of the *Allen* charge that have provoked criticism, without undermining the effectiveness of the original instruction in reminding the jury of its duty to deliberate in good faith.[7]

---

[7] The Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have approved *Allen* charges that speak to jurors in the majority as well as jurors in the minority and that emphasize that the jurors should not surrender their honest beliefs simply in order to reach a verdict. See, *e.g.*, *United States* v. *Burke*, 700 F.2d 70, 80 (2d Cir.), cert. denied, 464 U.S. 816 (1983); *United States* v. *Kelly*, 783 F.2d 575, 576-577 (5th Cir. 1986), cert. denied, No. 86-5429 (Oct. 14, 1986); *United States* v. *Scott*, 547 F.2d 334 (6th Cir. 1977); *United States* v. *Bonam*, 772 F.2d 1449, 1450 (9th Cir. 1985); *United States* v. *McKinney*, 822 F.2d 946 (10th Cir. 1987); *United States* v. *Rey*, 811 F.2d 1453 (11th Cir. 1987), petition for cert. pending, No. 86-2060. See also U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); Committee on Model Jury Instructions, *Manual of Model Jury Instructions for the Ninth Circuit* 98 (1985); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985). The pattern instruction followed in the Fifth and Eleventh Circuits is set out in the appendix to this brief.

The First, Third, Fourth, Seventh, Eighth, and District of Columbia Circuits, in the exercise of their supervisory powers, have required or encouraged district courts to use a milder formulation of the *Allen* charge patterned after the version approved by the American Bar Association that advises the jurors of their duty to deliberate and to attempt to reach a verdict. See *United States* v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States* v. *Fioravanti*, 412 F.2d 407, 414-420 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Sawyers*, 423 F.2d 1335 (4th Cir. 1970); *United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973) (en banc); *Potter* v. *United States*, 691 F.2d 1275 (8th Cir. 1982); *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (en banc); see also Committee on Model Criminal Jury Instructions for the Eighth Circuit, *Manual of Model Criminal*

Although there is disagreement regarding the precise text of the instruction that should be given to juries that have reported difficulties in deliberations, there is universal agreement among the federal courts that the trial court may remind the jurors of their responsibilities to attempt to reach a verdict. Every court of appeals has approved some type of supplemental charge to deadlocked jurors encouraging them to consider the views of the other jurors and to re-examine their positions without sacrificing their conscientiously held beliefs. The Federal Judicial Center and the American Bar Association have also approved modified *Allen* charges.[8] Common to all of these formulations is the belief that the jurors have the duty to consider the views of other jurors and to reach a verdict if they can do so in good conscience, even if they find the process to be difficult. This consensus serves as powerful support for the principle that some type of supplemental instruction may be delivered to the jury during its deliberations without coercing a verdict. In sum, precedent, reason, and experience strongly counsel against the conclusion that an *Allen* charge, however modified, is inherently coercive.

2. *The supplemental jury instruction given by the trial court in this case was not coercive*

The supplemental instruction in this case was mild and balanced. It was addressed to all of the jurors, not just those in the minority. It directed them to make an individual judgment on the appropriate

---

Jury Instructions for the Eighth Circuit § 7.02 (1985 & Supp. 1986). The ABA's suggested charge is set out in the appendix to this brief.

[8] Federal Judicial Center, *Pattern Jury Instructions* 17 (1982); ABA, Standards Relating to Trial by Jury § 5.4, at 145-146 (1968).

penalty. And it reminded them of their responsibility to listen to one another, to be open-minded and impartial, and to arrive at a verdict if possible. No reasonable person would have felt threatened by this admonition. See *California* v. *Brown*, No. 85-1563 (Jan. 27, 1987), slip op. 3. Significantly, petitioner did not object to the modified *Allen* charge when it was given as part of the main sentencing instructions or when the trial judge repeated the instruction during the jury's deliberations. Petitioner's silence buttresses the conclusion that the court's instructions did not have the coercive effect petitioner now attributes to them. See *Wainwright* v. *Witt*, 469 U.S. 412, 430-431 & n.11 (1985); *id.* at 437-438 & n.4 (Stevens, J., concurring).

The primary criticism of the *Allen* charge has been that it instructs jurors in the minority to re-examine their views, but does not contain a similar admonition to jurors who are in the majority.[9] It is that

---

[9] See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) ("[w]henever a court instructs jurors to re-examine their positions, it should expressly address its remarks to the majority as well as to the minority"); *United States* v. *Thomas*, 449 F.2d at 1183 (footnote omitted) (noting the coercive nature of "statements susceptible to an interpretation reflecting unwholesomely upon minority jurors simply because they happen to be in the minority"); *United States* v. *Sawyers*, 423 F.2d at 1342 (noting that the *Allen* charge would be "better balanced, and fairer, if mention [were] made of the duty of the majority to listen and consider any minority viewpoint, for * * * being in the majority does not necessarily make one right"); *United States* v. *Fioravanti*, 412 F.2d at 417 (indicating that the "very real treachery of the Allen Charge" is that "[i]t contains no admonition that the majority reexamine its position; it cautions only the minority to see the error of its ways"); *Fields* v. *State*, 487 P.2d 831, 836 (Alaska 1971); *State* v. *Thomas*, 86 Ariz. 161, 162-166, 342 P.2d 197, 198-201 (1959).

feature of the original *Allen* charge that led several federal courts of appeals to adopt a modified version of the *Allen* charge and to require that only the modified version be given. That criticism is inapplicable here. The charge in this case did not contain a passage singling out jurors in the minority and urging them to reconsider their views. Moreover, the judge scrupulously reminded the jurors that, in reconsidering their positions, they should not feel compelled to relinquish their honest beliefs solely because other jurors disagreed with them or just so that the jury could reach a verdict.[10]

The trial judge also did not advise the jury that it was required ultimately to agree upon a verdict, which was the type of statement that this Court found objectionable in *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965) ("You have got to reach a decision in this case."). On the contrary, the judge on three occasions reminded the jurors that, if they could not agree on a sentence, he would impose a sentence of life imprisonment without probation, parole, or suspension of sentence. Those remarks sent the clear message to the jurors that they were not required to render a verdict at all, and that their lack of agreement would not lead to a new trial or to another sentencing proceeding.[11]

---

[10] See *United States* v. *Scott*, 547 F.2d at 337; *United States* v. *Kahaner*, 317 F.2d 459, 484-485 (2d Cir.), cert. denied, 375 U.S. 836 (1963); *Berger* v. *United States*, 62 F.2d 438, 440 (10th Cir. 1932).

[11] For that reason, these instructions did not suffer from another defect commonly attributed to other variations of the *Allen* charge, which have been criticized for placing undue emphasis on the prospect of a retrial and the costs that it would impose on both parties. *E.g.*, *United States* v. *Silvern*, 484 F.2d at 880-881; *United States* v. *Thomas*, 449 F.2d at 1183; see *United States* v. *Harris*, 391 F.2d 348, 354-357 (6th

Petitioner contends (Br. 18-19) that the *Allen* charge was coercive because it was given when the jury announced that it was deadlocked, rather than simply as part of the main body of sentencing instructions. But forbidding the trial judge from delivering an *Allen* charge at the time the jury encounters difficulties—particularly when, as in this case, the jury asks to be reinstructed—would largely defeat its purpose. It is at the point at which jury deliberations break down that the jurors most need to be reminded of their duty to deliberate in good faith and with a willingness to consider the opinions of the other jurors. Moreover, a jury that has difficulty reaching a verdict will often look to the trial judge for guidance and encouragement. Ordering the judge to remain silent in that setting will leave the jury in distress and can only lead to confusion among the jurors as to what they should do. When the jury asks for help from the court, it is only reasonable to permit the court to give it. *United States* v. *Kahaner*, 317 F.2d 459, 484 (2d Cir.), cert. denied, 375 U.S. 836 (1963) ("it was quite natural for the judge to comply with the request, as the absence of any objection or exception from defense counsel confirms"); *White* v. *United States*, 279 F.2d 740, 750 (4th Cir.), cert. denied, 364 U.S. 850 (1960).

Contrary to petitioner's contention, the policies underlying the *Allen* charge are applicable to the sentencing phase of a case as well as the guilt phase. The state has a legitimate interest in having the jury "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois*, 391 U.S. 510, 519 (1968) (footnote omitted);

Cir.), cert. denied, 393 U.S. 874 (1968); compare *United States* v. *Angiulo*, 485 F.2d at 39 (charge made extensive references to expenses of trial).

see *Spaziano* v. *Florida*, 468 U.S. 447, 463 (1984); *id.* at 468-470, 480-481 (Stevens, J., dissenting). An *Allen* charge may help to ensure that each juror will perform his sworn responsibility to fix an appropriate punishment based on the considerations relevant to the case. In light of the state's legitimate interest in obtaining a jury verdict on the weighty matter of sentencing, a charge that helps ensure that the jury will perform its duty—in the face of great temptation to avoid doing so—is a perfectly legitimate charge for a court to give, as long as it is not unfairly coercive.[12]

Petitioner repeatedly asserts (Br. 14, 16, 22-24 & n.15) that the effect of the trial court's charge in this case was to communicate to the jury that the court wanted the jury to return a verdict of death. In fact, it is far from clear that that was the effect of the court's charge. It is true that the court on several occasions advised the jurors that if they could not reach a verdict the court would impose a life

---

[12] A common criticism of the *Allen* charge is that it undermines a defendant's right to a unanimous verdict. That criticism actually has *less* force in the sentencing phase than in the guilt phase of a trial. Unlike the right to a jury trial on the issue of guilt, a defendant has no constitutional right to have the jury determine his sentence. *Spaziano* v. *Florida*, 468 U.S. at 457-465; *Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). While due process in some cases may protect the defendant's right under state law to have the jury make findings at sentencing (see *Cabana* v. *Bullock*, 474 U.S. 376, 387-388 n.4 (1986); *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980)), the state may authorize a trial judge to override a jury's recommendation of life imprisonment (*Spaziano* v. *Florida*, *supra*). An *Allen* charge—even one that has the effect of communicating to the jury that the judge favors the death penalty—obviously involves a much less intrusive role by the court than a decision to override the jury's sentencing recommendation.

sentence. But that instruction did not necessarily suggest that the court favored the death penalty; the jurors could have interpreted it to mean that the court would impose a life sentence as a matter of choice and that the court therefore did not favor the death penalty in this case. In addition, rather than encouraging the forces on the jury who favored the death penalty, the court's instruction might have had the opposite effect. By informing the jury that the alternative to a capital sentence would be a no-parole life sentence, the court's instructions may have relieved pressure within the jury for a verdict of death based on some jurors' possible concern that their failure to reach a verdict would result in no sentence at all or only a short prison term. By assuring the jury that its failure to reach a verdict on sentence would not result in a windfall for the defendant, the court's instructions thus may have encouraged any jurors who were reluctant to vote for the death penalty to continue to resist that verdict.

Petitioner contends (Br. 19-20) that the modified *Allen* charge used here lightened the state's burden of proving at least one aggravating circumstance beyond a reasonable doubt before the jury could consider a capital sentence. That claim lacks merit. The supplemental instruction did not in any way reduce the state's burden of proof, nor did it imply that the jury could resolve its difficulty in reaching a unanimous verdict by using a lower standard of proof (see J.A. 44 (trial court's main sentencing instructions)). In fact, the second modified *Allen* charge used by the court was identical to the one found in the main sentencing instructions. There is no more reason to believe that the jury was misled by the second modified *Allen* charge than by the first one. It is nothing more than speculation to suppose that the jurors will for-

get the main body of instructions given by a trial judge, including the instructions on the government's burden of proof, simply because the judge supplements that charge once the jury signals that it is having difficulty reaching a verdict. Cf. *Hyde* v. *United States*, 225 U.S. at 383.[13]

Finally, the fact that the jury returned a verdict after only another half hour of deliberation following the *Allen* charge does not suggest that the *Allen* charge was unfairly coercive. See *United States* v. *Smith*, 635 F.2d 716, 721-722 (8th Cir. 1980) (45-minute period between charge and verdict not indicative of coercion); *United States* v. *Dawkins*, 562 F.2d 567, 570 (8th Cir. 1977) (same); *Andrews* v. *United States*, 309 F.2d 127, 130 (5th Cir. 1962) (25-minute period). The charge given by the trial court forcefully reminded the jurors not to relinquish their honest beliefs just to reach a verdict. Although the fact that the jury reached a verdict following the *Allen* charge obviously suggests that the charge had some effect, there is no reason to suppose that the effect was the improper one of coercing a verdict, rather than the entirely proper one of persuading the

---

[13] To bolster his argument, petitioner relies (Br. 19) on the rule adopted by the First and Eighth Circuits that a supplemental instruction should reiterate the government's burden of proof. See *United States* v. *Angiulo*, 485 F.2d 37, 43 (1st Cir. 1973); *Potter* v. *United States*, 691 F.2d 1275, 1280 (8th Cir. 1982). These two circuits stand alone on this point. The *Allen* decision does not require the jury to be reinstructed on the government's burden of proof (164 U.S. at 501-502), and the other federal courts of appeals have not adopted such a rule. Even the two circuits that have required a reinstruction on the burden of proof have done so in the exercise of their supervisory powers, and have not held that such a reinstruction is constitutionally required.

jury to make another good faith effort to reach agreement.

B. Polling The Jury To Determine The Utility Of Further Deliberations, Even In Conjunction With The Modified Supplemental *Allen* Charge, Was Not Coercive

Relying upon this Court's decision in *Brasfield* v. *United States*, 272 U.S. 448 (1926), petitioner also challenges (Br. 14-16) the court's poll of the jury on the question whether further deliberations would be useful. The inquiry undertaken by the trial judge in this case, however, is not the type of inquiry that the Court condemned in *Brasfield*, and it did not have the coercive impact of the inquiry at issue in that case.

1. *Brasfield* must be read against the background of the Court's decision in *Burton* v. *United States*, 196 U.S. 283 (1905). In *Burton*, the trial judge asked the jury for its numerical division before delivering an *Allen* charge. 196 U.S. at 305. The conviction was reversed on other grounds, but this Court disapproved of the judge's inquiry. The Court emphasized that, from the standpoint of "the proper administration of the law," there was no need for the inquiry, since "[a]ll that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division" (*id.* at 308). The Court added that, because "[c]ases may easily be imagined where a practice of this kind might lead to improper influences," the practice should not be followed (*ibid.*).

In *Brasfield*, the jury deliberated for several hours without reaching a verdict. The judge then brought the jury into court and asked the foreman how the jury stood numerically. The foreman replied that

the jury stood nine to three, without indicating which number favored a conviction. 272 U.S. at 449. The judge then delivered a modified *Allen* charge. Transcript of Record at 95, *Brasfield* v. *United States*, No. 243, 1926 Term. This Court reversed in a brief opinion, ruling that district courts should not ask a deadlocked jury for its numerical division. The Court explained that the inquiry "serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division" (272 U.S. at 450). The Court held that such an inquiry would be treated as per se reversible error, since the practice will generally have a coercive effect that is difficult to assess in a particular case (*ibid.*).

Two aspects of the decision in *Brasfield* are significant here. *First*, the ruling in *Brasfield* rested on the Court's supervisory power, and not the Constitution, as the federal courts of appeals have unanimously concluded.[14] While the opinion stated that the

---

[14] In habeas corpus actions challenging state convictions, the courts of appeals have uniformly rejected a requirement of reversal per se in favor of determining whether the accused was actually prejudiced under the totality of the circumstances. See *Williams* v. *Parke*, 741 F.2d 847, 851 (6th Cir. 1984), cert. denied, 470 U.S. 1029 (1985); *Locks* v. *Sumner*, 703 F.2d 403, 405-407 (9th Cir.), cert. denied, 464 U.S. 933 (1983); *United States ex rel. Kirk* v. *Director, Dep't of Corrections*, 678 F.2d 723, 725-727 (7th Cir. 1982); *Cornell* v. *Iowa*, 628 F.2d 1044, 1047-1048 (8th Cir. 1980), cert. denied, 449 U.S. 1126 (1981); *Ellis* v. *Reed*, 596 F.2d 1195, 1197-1198 (4th Cir.), cert. denied, 444 U.S. 973 (1979); *Jones* v. *Norvell*, 472 F.2d 1185, 1186 (6th Cir.), cert. denied, 411 U.S. 986 (1973); *Marsh* v. *Cupp*, 392 F. Supp. 1060, 1063-1064 (D. Or. 1975), aff'd, 536 F.2d 1287, 1290-1291 (9th Cir.), cert. denied, 429 U.S. 981 (1976).

State courts have also generally ruled that the *Brasfield* rule does not rest on the Due Process Clause. See, *e.g.*, *People* v. *Carter*, 68 Cal. 2d 810, 815, 442 P.2d 353, 356, 69 Cal.

rule adopted by the Court was "essential to the fair and impartial conduct of the trial" (272 U.S. at 450), nowhere did the opinion mention the Due Process Clause or any other constitutional provision. And a reading of the *Burton* case, on which *Brasfield* was based, makes it clear that the Court was employing its supervisory power over the federal courts to direct that the inquiry not be made in federal cases because of the risk that it "might lead to improper influences" in some instances.

Second, the decision in *Brasfield* rested on three factors: (1) the judge's solicitation (2) of the jury's numerical division (3) followed by the use of an *Allen* charge. The importance of those factors is implicit in both *Brasfield* and *Burton*, and the federal courts of appeals have read *Brasfield* as limited to that factual context. They have not required that a conviction automatically be reversed when information is not solicited by the judge, but is volunteered by the jurors.[15] They also have not required reversal

---

Rptr. 297, 300 (1968); *State* v. *Rickerson*, 95 N.M. 666, 625 P.2d 1183, cert. denied, 454 U.S. 845 (1981); *State* v. *Fowler*, 312 N.C. 304, 307-308, 322 S.E.2d 389, 391-392 (1984); *Muhammad* v. *State*, 243 Ga. 404, 407-408, 254 S.E.2d 356, 358-359 (1979); *State* v. *Roberts*, 131 Ariz. 513, 515-516, 642 P.2d 858, 860-861 (1982); cf. *Mayfield* v. *State*, 302 Md. 624, 631-632 & n.3, 490 A.2d 687, 691-692 & n.3 (1985) (no reversible error when a jury voluntarily reveals its division, distinguishing the voluntary disclosure from *Brasfield*). Some courts, however, have exercised their supervisory power to forbid trial judges from polling the jury. *E.g.*, *People* v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812 (1974).

[15] *E.g.*, *United States* v. *Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986); *United States* v. *Akbar*, 698 F.2d 378, 380 (9th Cir.), cert. denied, 461 U.S. 959 (1983); *United States* v. *Cook*, 663 F.2d 808, 809 n.3 (8th Cir. 1981); *United States* v. *Warren*, 594 F.2d 1046, 1049 n.3 (5th Cir. 1979); *United*

when the judge asks whether further deliberations would be useful, rather than how the jury is divided.[16] And they have not reversed convictions when the judge's inquiry is not followed by an *Allen* charge.[17]

2. The trial court's inquiry in this case did not run afoul of *Brasfield* for both of the reasons discussed above. First, because this is a state prosecution, the supervisory rule adopted in *Burton* and *Brasfield* is inapplicable. The issue instead is whether the inquiry by the court was so coercive as to violate petitioner's rights under the Constitution. Second, the inquiry in this case was not an inquiry into the numerical division of the jury, but only into whether the jurors believed further deliberations would be useful—a very different matter from the inquiry at issue in *Brasfield*.

States v. *Diggs*, 522 F.2d 1310, 1322 (D.C. Cir. 1975), cert. denied, 429 U.S. 852 (1976); *United States* v. *Jennings*, 471 F.2d 1310, 1313-1314 (2d Cir.), cert. denied, 411 U.S. 935 (1973); *Gafford* v. *Warden*, 434 F.2d 318, 319 (10th Cir. 1970); *United States* v. *Sawyers*, 423 F.2d 1335, 1340-1341 (4th Cir. 1970); *Sanders* v. *United States*, 415 F.2d 621, 629, 631-632 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); *United States* v. *Rao*, 394 F.2d 354, 356 (2d Cir.), cert. denied, 393 U.S. 845 (1968); *Bowen* v. *United States*, 153 F.2d 747, 752 (8th Cir.), cert. denied, 328 U.S. 835 (1946). But see *United States* v. *Sae-Chua*, 725 F.2d 530 (9th Cir. 1984).

[16] *United States* v. *Smoot*, 463 F.2d 1221, 1223 (D.C. Cir. 1972); *Carlton* v. *United States*, 395 F.2d 10, 11 (9th Cir. 1968), cert. denied, 393 U.S. 1030 (1969); *United States* v. *Mack*, 249 F.2d 321, 324 (7th Cir. 1957), cert. denied, 356 U.S. 920 (1958); see *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977); *United States* v. *See*, 505 F.2d 845, 851 (9th Cir. 1974), cert. denied, 420 U.S. 992 (1975).

[17] *Beale* v. *United States*, 263 F.2d 215 (5th Cir. 1959); *Butler* v. *United States*, 254 F.2d 875 (5th Cir. 1958); see also *United States* v. *Rogers*, 289 F.2d 433, 435 n.5 (4th Cir. 1961) (dictum).

The inquiry as to whether further deliberations will be useful should not be treated in the same manner as an inquiry into the jury's division, because determining whether further deliberations would be useful has the legitimate purpose of helping the court decide whether to declare a mistrial. The decision whether a mistrial should be declared because the jurors are unalterably deadlocked is a difficult one and can have serious repercussions for both parties. See *Arizona* v. *Washington*, 434 U.S. 497, 509-510 (1978); *United States* v. *Graham*, 758 F.2d 879, 884 (3d Cir.), cert. denied, 474 U.S. 901 (1985); *United States* v. *Goldstein*, 479 F.2d 1061, 1069 (2d Cir.), cert. denied, 414 U.S. 873 (1973). It is a step that ought to be taken with caution and only after the judge concludes that continued deliberations would be pointless. Given the importance of the decision, a trial judge ought to have as much information as reasonably possible before determining whether to discharge the jury. The single most important fact bearing on that decision is how the jurors themselves feel about the likelihood that continued deliberations may result in a verdict. Just as it would be unfortunate to discharge a jury that can reach agreement, so too it would be unreasonable to force jurors to prolong their deliberations if all or most of them doubt that a consensus can be reached. Determining the utility of further deliberations therefore is an entirely legitimate reason to question the jurors. *United States ex rel. Anthony* v. *Sielaff*, 552 F.2d 588, 590 (7th Cir. 1977); see *United States ex rel. Webb* v. *Court of Common Pleas*, 516 F.2d 1034, 1043-1044 (3d Cir. 1975).

Besides serving a legitimate and important purpose, an inquiry of the sort conducted in this case is not inherently coercive. It is not designed to, and

need not, elicit the jurors' numerical division. Jurors convinced of the defendant's guilt may believe with equal conviction that the deadlock cannot be broken. Jurors not convinced beyond a reasonable doubt may be open to persuasion and may have additional concerns they would like to explore in further deliberations. Contrary to petitioner's assumption, the jurors' assessments of the prospects for a verdict thus do not inevitably reflect the jury's division on the underlying issue.

Finally, the inquiry is neutral. It does not by its nature suggest that the judge desires any particular outcome. It asks only whether the jurors wish to continue their deliberations. In fact, trial judges often ask juries about the progress of deliberations for reasons totally divorced from resolving a deadlock—*e.g.*, to plan mealtimes or to make accommodations for sequestration of the jury. Thus, it cannot be presumed that an inquiry of the sort conducted in this case is inevitably coercive, and for that reason, it would be inappropriate to extend the rule adopted in *Brasfield* to this kind of inquiry.[18]

---

[18] Although the issue is not directly presented in this case, we believe that in the appropriate case this Court may wish to reconsider the aspect of *Brasfield* that requires reversal in any federal case in which the court inquires into the division of the jury. At the time *Brasfield* was decided in 1926, every circuit endorsed a version of the *Allen* charge that included a passage specifically directed to jurors in the minority. See *Fulwood* v. *United States*, 369 F.2d 960, 962 & n.3 (D.C. Cir. 1966) (collecting cases), cert. denied, 387 U.S. 934 (1967). The combination of asking the jurors about their numerical division and admonishing the jurors in the minority to rethink their views must have seemed to the Court to be a virtual guarantee of coerciveness. But several circuits today forbid an admonition specifically directed to the minority

* * * * *

In sum, we submit that the two procedures challenged here—the delivery of an *Allen* charge and the inquiry of the jurors as to whether further deliberations would likely be productive—are both legitimate steps for a trial court to take when a deliberating jury has difficulty reaching a verdict. And even if those measures can be coercive under some circumstances, nothing in the record suggests that those steps had a coercive effect on the jury in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed insofar as that court rejected petitioner's claim that the jury was coerced into returning a capital sentence.

---

jurors. When that is the case, the Court's fears about the "general[] harmful[ness]" of such an inquiry (*Brasfield*, 272 U.S. at 450) should be greatly alleviated.

Furthermore, since *Brasfield* was decided, this Court has emphasized that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless" (*United States* v. *Hasting*, 461 U.S. 499, 509 (1983)), and that the courts are capable of discerning whether most errors, including most constitutional violations, are prejudicial (see *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 8, 9 & n.7). Two decisions are particularly relevant. *United States* v. *Hasting*, 461 U.S. at 505-512, ruled that the federal courts may not invoke their supervisory power to upset a conviction if an error is harmless. Similarly, *United States* v. *Lane*, 474 U.S. 438, 444-446 (1986), held that the per se rule adopted in *McElroy* v. *United States*, 164 U.S. 76 (1896), that the misjoinder of offenses requires reversal, must be re-examined in light of the subsequent developments in the harmless error doctrine. The decisions in *Hasting* and *Lane* support the conclusion that the procedural rule adopted in *Brasfield* should not call for reversal in every case regardless of the circumstances.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

PAUL J. LARKIN, JR.
Assistant to the Solicitor General

SARA CRISCITELLI
Attorney

SEPTEMBER 1987

APPENDIX

1. The supplemental jury instruction approved in *Allen* provided, in relevant part, as follows (Transcript of Record at 137-138, *Allen* v. *United States*, No. 371, 1896 Term):

> The only mode provided by our Constitution and laws for deciding questions of fact in criminal cases is by the verdict of the jury. In a large proportion of cases, and, perhaps, strictly speaking, in all cases, absolute certainty can not be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner and from the same source from which any future jury must be, and there is no reason to suppose that the case will ever be submitted to 12 men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view it is your duty to decide the case if you can conscientiously do so. In order to make the decision more practicable, the law imposes the burden of proof on the one party or the other in all cases. In the present case the burden of proof is upon the Goverment of the United States. But in con-

> ferring together you ought to pay proper respect to each other's opinions and listen with a disposition to be convinced to each other's arguments. And, on the other hand, if much the larger number of your panel are for conviction, a dissenting juror should consider a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought to seriously ask themselves whether they may not reasonably and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows.

2. The Fifth and Eleventh Circuits have approved a supplemental instruction that takes the following form (see U.S. Fifth Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 168-169 (1978); U.S. Eleventh Circuit District Judges Association, *Pattern Jury Instructions—Criminal Cases* 262-263 (1985)):

> I'm going to ask that you continue your deliberations in an effort to reach agreement upon a verdict and dispose of this case; I have a few additional comments I would like for you to consider as you do so.
>
> This is an important case. The trial has been expensive in time, effort, money and emotional strain to both the defense and the prosecution.

If you should fail to agree upon a verdict, the case will be left open and may have to be tried again. Obviously, another trial would only serve to increase the cost to both sides, and there is no reason to believe that the case can be tried again by either side any better or more exhaustively than it has been tried before you.

Any further jury must be selected in the same manner and from the same source as you were chosen, and there is no reason to believe that the case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it, or have that more or clearer evidence could be produced.

If a substantial majority of your number are in favor of a conviction, those of you who disagree should reconsider whether your doubt is a reasonable one, since it appears to make no effective impression upon the minds of the others. On the other hand, if a majority or even a less number of you are in favor of an acquittal, the rest of you should ask yourselves again and most thoughtfully whether you should accept the weight and sufficiency of evidence which fails to convince your fellow jurors beyond a reasonable doubt.

Remember at all times that no juror is expected to give up an honest belief he or she may have as to the weight or effect of the evidence; but, after full deliberation and consideration of the evidence in the case, it is your duty to agree upon a verdict if you can do so.

You must also remember that if the evidence in the case fails to establish guilt beyond a reasonable doubt the Defendant should have your unanimous verdict of Not Guilty.

You may be as leisurely in your deliberations as the occasion may require and should take all the time which you may feel is necessary.

I will ask now that you retire once again and continue your deliberations with these additional comments in mind to be applied, of course, in conjunction with all of the other instructions I have previously given you.

3. The American Bar Association has approved the following standard for supplemental instructions (Standards Relating to Trial by Jury § 5.4, at 145-146 (1968)):

Length of Deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of

the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 60009

Supreme Court, U.S.
FILED
SEP 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

In the

Supreme Court of the United States

October Term, 1986

Leslie Lowenfield ..... *Petitioner*

v.

C. Paul Phelps,
Secretary of the Department of
Corrections, State of
Louisiana, *et al.* ..... *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE *AMICUS CURIAE* THE STATE OF ARKANSAS IN SUPPORT OF C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS STATE OF LOUISIANA, *ET AL.*

J. STEVEN CLARK
Attorney General of Arkansas

CLINT MILLER
Assistant Attorney General
Heritage West Building
201 East Markham
Little Rock, AR 72201
(501) 371-3657

Attorneys of Record
for AMICUS CURIAE
The State of Arkansas

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE *AMICUS CURIAE* THE STATE OF ARKANSAS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT:

PETITIONER'S DEATH SENTENCE, BASED ON A SOLE STATUTORY "AGGRAVATING" CIRCUMSTANCE THAT MERELY REPEATS AN ELEMENT OF THE CRIME, DOES NOT VIOLATE THE EIGHTH AMENDMENT REQUIREMENT THAT SENTENCER DISCRETION BE DIRECTED AND LIMITED SO AS TO MINIMIZE THE RISK OF ARBITRARY AND CAPRICIOUS EXECUTIONS 5

A. *Louisiana Revised the Statute 14:30(A) (3) and Louisiana Code of Criminal Procedure Article 905.4(d) Are Not Identical* 5

B. *The Eighth Amendment Does Not Require the States to Arrange Aggravating Circumstances Within a Capital Sentencing Procedure Such That the Class of Murders Eligible for the Death Penalty is Genuinely Narrowed Twice—Once at the Guilt Stage and Again at the Penalty Stage of a Capital Trial* 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES: Page

Adams v. Texas, 448 U.S. 38 (1980) 13

Collins v. Lockhart, 754 F.2d 258 (8th Cir. ____), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985) 2, 6, 9, 14

Estelle v. Smith, 451 U.S. 454 (1981) 13

Evans v. Thigpen, 809 F.2d 239 (1987) 10

Glass v. Blackburn, 791 F.2d 1165 (1986) 10

Gregg v. Georgia, 428 U.S. 153 (1976) 9

Jurek v. Texas, 428 U.S. 262 (1976) 4, 11

Lowenfield v. Phelps, 817 F.2d 285 (1987) 2, 10, 14

McClellan v. Commonwealth, 715 S.W.2d 466 (Ky. 1986) 10

Pickens v. State, 292 Ark. 362, 730 S.W.2d 230 (1987) (Hickman, J., concurring) 10

Profitt v. Florida, 428 U.S. 242 (1976) 9

Roberts v. Louisiana, 428 U.S. 325 (1976) 7

Ruiz and Denton v. Lockhart, 806 F.2d 158 (8th Cir. 1986) 10

Singleton v. Lockhart, 653 F.Supp. 1114 (E.D. Ark. 1986) 10

Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669, 90 L.Ed.2d (1986) 13

State v. Andrews, 452 So.2d 687 (La. 1984) 7

State v. Moore, 414 So.2d 340 (La. 1982) 6

State v. Quesinberry, 319 N.C. 228, 354 S.E.2d 446 (1987) 10

State v. Sonnier, 402 So.2d 650 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983) 6

State v. Welcome, 458 So.2d 1235 (La. 1983) 6

State v. Williams, 317 N.C. 474, 346 S.E.2d 405 (1986) 10, 13

State v. Williams, 480 So.2d 721, 726 (La. 1985) 6

Welcome v. Blackburn, 793 F.2d 672 (1986) 10, 13

Wiley v. Mississippi, ____ U.S. ____, 107 S.Ct. 304, 93 L.Ed.2d 278 (1986) 10

Williams v. Ohio, ____ U.S. ____, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987) 10

Willie v. State, 360 So.2d 813 (La. 1978) 7

Wilson v. Butler, 813 F.2d 664 (1987) 10

Wingo v. Blackburn, 783 F.2d 1046 (1986) 10

Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986) 10

Zant v. Stephens, 462 U.S. 862 (1983) 4, 5, 11, 12

TREATISES AND LAW REVIEW ARTICLES

Page

J. Hall, *General Principles of Criminal Law* (2d. Ed. 1960) 6

Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duquesne Law Review 317 (1984) 4, 13

No. 86-6867

In the
Supreme Court of the United States

October Term, 1986

Leslie Lowenfield ..... *Petitioner*

v.

C. Paul Phelps,
Secretary of the Department of
Corrections, State of
Louisiana, *et al* ..... *Respondents*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE *AMICUS CURIAE* THE STATE OF ARKANSAS IN SUPPORT OF C. PAUL PHELPS, SECRETARY OF THE DEPARTMENT OF CORRECTIONS STATE OF LOUISIANA, *ET AL.*

STATEMENT OF THE INTERST OF THE *AMICUS CURIAE* THE STATE OF ARKANSAS

Amicus curiae the State of Arkansas supports the position of the Respondents C. Paul Phelps Secretary of the Department of Corrections State of Louisiana, *et. al.*, with respect to the Eighth Amendment issue presented in the instant case. In this case, petitioner Lowenfield is asking this Honorable Court to resolve a conflict in the interpretation of the Eighth Amendment that exists between the United States Fifth Circuit Court of Appeals and the United States Eighth Circuit Court of Appeals. In essence, the Eighth Circuit Court of Appeals has held that

the Eighth Amendment requires that a state's capital sentencing procedure genuinely narrow the class of murderers eligible for the death penalty when the state defines capital murder and also genuinely narrow this class again at the penalty stage of a capital trial. The Fifth Circuit Court of Appeals has rejected the Eighth Circuit's interpretation of the Eighth Amendment and has held that the Eighth Amendment requires that a state's capital sentencing procedure genuinely narrow the class of murderers eligible for the death penalty only once.

Amicus curiae the State of Arkansas is within the jurisdiction of the Eighth Circuit Court of Appeals. Pursuant to its holding in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.) *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985), the Eighth Circuit Court of Appeals, in appeals from habeas corpus petitions brought pursuant to 28 U.S.C. §2254, has vacated four death sentences imposed by Arkansas juries and approved by the Arkansas Supreme Court. There are twenty-nine inmates on death row in Arkansas. Of these, twenty have sentences that could be vacated if the *Collins* holding were applied to their sentences. *Amicus curiae* the State of Arkansas' interest in the instant case is its desire to stop the Eighth Circuit Court of Appeals from clearing out Arkansas' death row pursuant to that court's erroneous interpretation of the Eighth Amendment in *Collins, supra*. *Amicus curiae* the State of Arkansas respectfully requests that this Honorable Court declare that the Eighth Circuit Court of Appeals' *Collins* decision incorrectly interprets the Eighth Amendment and respectfully requests that this Honorable Court affirm the United States Fifth Circuit Court of Appeals Eighth Amendment holding in the case *sub judice*, *Lowenfield v. Phelps*, 817 F.2d 285 (1987).

SUMMARY OF ARGUMENT

The two Louisiana statutes at issue, La. Rev. Stat. 14:30 (A) (3) (1986) and La. C.Cr.P. art. 905.4(d) (1984), are not identical. Section 30(A) (3) is part of the definition of capital murder and sets forth a particular *mens rea*—that of entertaining a specific intent to kill or inflict great bodily harm upon more than one person. Art. 905.4(d) is an aggravating circumstance in Louisiana's capital sentencing procedure. A Louisiana jury may find art. 905.4(d) when the defendant engaged in a particular *actus reus*—that of *actually creating* a risk of death or great bodily harm to more than one person. At a minimum, § 30(A) and art. 905.4(d) both meet the standard for valid aggravating circumstances set forth in *Zant v. Stephens*, 462 U.S. 862, 877 (1983). As between the two statutes, art. 905.4(d) genuinely narrows the class of murderers eligible for the death penalty slightly more than § 30(A) (3) does.

Conceivably, a defendant in Louisiana could entertain the culpable mental state set forth in § 30(A) (3) while murdering his victim, but subsequently fail to actually create a risk of death or great bodily harm to others. For example, after murdering his victim, a first degree murderer in Louisiana could simply relent and abandon his specific intention to kill others. Because § 30(A) (3) proscribes a particular *mens rea*—specific intent—and because art. 905.4(d) punishes the defendant's conduct, not his thoughts, they are not identical. Because conduct usually, but not inevitably, follows a specific intent, art. 905.4(d) further narrows down the class of first degree murderers in Louisiana who kill with the specific intent set forth in §30(A) (3). Moreover, actually creating a risk of death or great bodily harm to others, as opposed to merely planning to do so, justifies the imposition of the death penalty on Louisiana first degree murderers who actually create such a risk. *See Stephens, supra* at 877.

Assuming *arguendo* that § 30(A) (3) and art. 905.4(d) are identical, their congruence does not violate the Eighth Amendment. The Eighth Amendment permits states to place aggravating circumstances in their definitions of capital murder in order to genuinely narrow the class of murderers eligible for the death penalty. *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976). If a state genuinely narrows the class of murderers eligible for the death penalty at the definitional stage of capital murder, then the state need not further narrow this class of murderers at the penalty stage of a capital trial. *Zant v. Stephens*, 462 U.S. 862, 876-77 (1983); *see generally*, Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duquesne Law Review 317, 360-69 (1984).

ARGUMENT

PETITIONER'S DEATH SENTENCE, BASED ON A SOLE STATUTORY "AGGRAVATING" CIRCUMSTANCE THAT MERELY REPEATS AN ELEMENT OF THE CRIME, DOES NOT VIOLATE THE EIGHTH AMENDMENT REQUIREMENT THAT SENTENCER DISCRETION BE DIRECTED AND LIMITED SO AS TO MINIMIZE THE RISK OF ARBITRARY AND CAPRICIOUS EXECUTIONS.

A. *Louisiana Revised Statute 14:30(A) (3) and Louisiana Code of Criminal Procedure art. 905.4(d) are not identical.*

Petitioner Lowenfield's Eighth Amendment argument emanates from a single alleged flaw in Louisiana's statutory capital sentencing procedure: the "complete overlap" of La.Rev.Stat. 14:30(A) (3) (1986) and La.C.Cr.P. art. 905.4(d) (1984). In pertinent part § 30(A) (3) states, "[f]irst degree murder is killing of a human being . . . [w]hen the offender has a specific intent to kill or to inflict great bodily harm upon more than one person . . . ." In pertinent part art. 905.4(d) states, "[t]he following shall be considered aggravating circumstances . . . the offender knowingly created a risk of death or great bodily harm to more than one person . . . ." Section 30(A) (3) is an element of the crime of first degree murder, a capital offense in Louisiana. Art. 905.4(d) is an aggravting circumstance that the jury may consider in the penalty stage of a capital trial in Louisiana. The alleged congruence of these two statutes is the first principle from which Lowenfield's Eighth Amendment analysis proceeds. According to Lowenfield, because art. 905.4(d) exactly duplicates § 30(A) (3), art. 905.4(d) does not meet the Eighth Amendment standard for valid aggravating circumstances set forth in *Zant v. Stephens*, 462 U.S. 862 (1982) because it does not " . . . genuinely narrow the class of persons eligible for the death penalty . . . ." *Id.* at 877. According to Lowenfield, because art. 905.4(d)

does not meet the *Stephens* standard, his death sentence was imposed in violation of the Eighth Amendment and is, therefore, invalid. Lowenfield's analysis of this issue is derived entirely from the United States Eighth Circuit Court of Appeal's decision in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). Lowenfield's argument on this score is meritless because his first principle is incorrect; in point of fact, § 30(A)(3) and art. 905.4(d) are not identical.

Section 30(A)(3) and art. 905.4(d) fall on either side of the most fundamental dividing line in the taxonomy of substantive criminal law – that line between the concepts of *mens rea* and *actus reus*. [1] Section 30(A)(3) sets forth one of several culpable mental states that a defendant must have when he kills a human being in order to be guilty of first degree murder in Louisiana. Art. 905.4(d), on the other hand, describes a certain kind of conduct, apart from the killing of one human being while entertaining a certain culpable mental state, that the defendant must engage in, in order to be eligible for the death penalty in Louisiana. The Louisiana Supreme Court has consistently held that in order for art. 905.4(d) to apply, the defendant must, *actually* cause the risk of death or great bodily harm to someone other than his initial victim. *State v. Williams*, 480 So.2d 721, 726 (La. 1985); *State v. Welcome*, 458 So.2d 1235, 1245 (La. 1983); and *State v. Sonnier*, 402 So.2d 650, 658 (La. 1981), *cert. denied*, 463 U.S. 1229 (1983); *cf. State v. Moore*, 414 So.2d 340, 348 (La. 1982) (art. 905.4(d) improperly found by the jury because the defendant did not actually create risk of death or great bodily harm to a four-month-old infant by stabbing the infant's mother in the mother's home and then leaving the scene as the mother lay dying; no risk of death or great bodily harm to the infant because she was

---

1

Mens rea is the mental state which is required to animate most kinds of conduct proscribed by criminal laws and *actus reus* is the proscribed conduct itself. J. Hall, *General Principles of Criminal Law* 70-1, 222-24 (2d. ed. 1960).

not harmed or threatened). It is possible for a defendant to murder one person while entertaining the specific intention to murder a second person and yet never actually create a risk of death or great bodily harm to the second person – for example the defendant could simply relent after his initial murder and not make any further effort to kill or the defendant's intended second victim might not be within striking distance. [2] In *State v. Andrews*, 452 So.2d 687 (La. 1984), Justice Lemmon of the Louisiana Supreme Court, dissenting from the majority's holding that the State had failed to prove the specific intent required by § 30(A)(3), noted that:

> The present case raises for the first time an issue concerning the difference in terminology between La.R.S. 14:30(3), which defines one of the aggravating factors required as an essential element of the crime of first degree murder, and La.C.Cr.P. art. 905.4(d), which defines one of the statutory aggravating circumstances required for a recommendation of the death penalty in the sentencing phase of a bifurcated capital trial. When a defendant acts with a specific intent to kill more than one person, but does not actually and "knowingly create a risk of death or great bodily harm to more than one

---

2

Such a set of facts occurred in the case of *Willie v. State*, 360 So.2d 813, 816 (La. 1978). In *Willie*, the instant issue was not discussed because the Louisiana Supreme Court vacated appellant Willie's death sentence on the authority of *Roberts v. Louisiana*, 428 U.S. 325 (1976). According to the Louisiana Supreme Court in *Willie*, appellant Willie was guilty of first degree murder because he had killed one person while entertaining the specific intention to kill or inflict great bodily harm upon more than one person. *Id.* at 816. The Louisiana Supreme Court concluded that Willie had intended to break into his neighbor's parents' house and kill the neighbor and her parents. The Louisiana Supreme Court reached this conclusion despite the fact that the parents were not at home when Willie broke into their home and killed their daughter. Because the parents were not at home when Willie murdered their daughter, Willie could not possibly have harmed or threatened them *at that time*. *Cf. Moore*, *supra*. Because Willie could not have harmed or threatened the parents of his victim while he was murdering his victim, he could not have *actually* created a risk of harm to the parents of his victim and, therefore, a jury would have had no factual basis to find that Willie fell within the reach of art. 905.4(d).

> person", he is guilty of first degree murder, but arguably *may* not be "death qualified" because of the insufficiency of proof of a statutory aggravating circumstance. The present case, however, does not present this problem, because the jury did not recommend the death penalty. *Id.* at 690 n.2.

In summary, it is simply not true, as Lowenfield contends, that criminal defendants always follow through on their specific intents and actually do that which they had merely contemplated.

It is true that Lowenfield did act on his specific intent and did actually create a risk of death or great bodily harm to someone other than his initial victim. It was Lowenfield's choice to do so. That Lowenfield chose to do so *does* differentiate him from defendants guilty of first degree murder pursuant to § 30(A)(3) who do not actually create a risk of death or great bodily harm to others. Furthermore, Lowenfield's actual creation of this risk does reasonably justify the imposition of death on him compared to the first degree murderers who do not create such a risk.

In light of the *amicus'* analysis presented above, Lowenfield's actual complaint is not that the absolute congruence between § 30(A)(3) and art. 905.4(d) prevents them from genuinely narrowing the field of first degree murderers in Louisiana, but that art. 905.4(d) fails to genuinely narrow a subclass of first degree murderers already separated out of the class of all murderers by the winnowing action of § 30(A)(3). As *amicus curiae* the State of Arkansas will demonstrate in the next subsection of its argument, the Eighth Amendment does not require a state to erect a "double-filter" arrangement of aggravating circumstances that separates the class of murderers eligible for the death penalty from the larger class of those who are not and then within the class of death-eligible murderers, genuinely narrows this class (or a subclass of this class) again down to those who *truly* deserve to die.

B. *The Eighth Amendment does not require the states to arrange aggravating circumstances within a capital sentencing procedure such that the class of murderers eligible for the death penalty is genuinely narrowed twice—once at the guilt stage and again at the penalty stage of a capital trial.*

Boiled down to its essence, Lowenfield's argument amounts to a claim that the Eighth Amendment commands that a state structure its capital sentencing procedure in such a way so as to genuinely narrow the class of murderers eligible for the death penalty two times. According to Lowenfield, one such genuine narrowing must occur in a capital trial at the definitional level of the state's capital murder statute and, according to Lowenfield, a second genuine narrowing must occur at the penalty stage of the capital trial.[3] Lowenfield's argument on this point is, essentially, a recitation of analysis first set forth by the United States Eighth Circuit Court of Appeals in *Collins v.*

3

It is beyond question that art. 905.4(d) is, of itself, a valid aggravating circumstance no matter where it is placed in a state's capital sentencing procedure—it is valid because it genuinely narrows the class of defendants eligible for the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 193 n.44 (1976) and *Profitt v. Florida*, 428 U.S. 242, 248 n.6 (1976) (both approving an aggravating circumstance virtually identical to art. 905.4(d)).

Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985). [4]

The Eighth Amendment analysis set forth by the Eighth Circuit Court of Appeals in *Collins* involved an interpretation of murder committed in the course of an aggravated robbery (robbery-murder was (and is) capital murder in Arkansas—*see* Ark. Stat. Ann. § 41-4702(A) (Supp. 1973)) and the aggravating circumstance of "capital murder committed for pecuniary gain," as set forth in Ark. Stat. Ann. § 41-1303(6) (Repl. 1977). In *Collins* the Eighth Circuit set forth a universal truth that every robber-murderer kills in order to realize a pecuniary gain. *Id.* at 264. From this first principle the Eighth Circuit concluded that a jury would automatically find pecuniary gain as an aggravating circumstance in every robbery-murder case and that, therefore, pecuniary gain " . . . cannot be a factor that distinguishes some robber-murderers from others." *Id.*

4

Collins, supra has been followed as binding authority in *Woodard v. Sargent*, 806 F.2d 153 (8th Cir. 1986); *Ruiz and Denton v. Lockhart*, 806 F.2d 158 (8th Cir. 1986) and *Singleton v. Lockhart*, 653 F.Supp. 1114, 1134-37 (E.D. Ark. 1986). Justices Brennan and Marshall have stated that they agree with the Eighth Amendment analysis set forth by the Eighth Circuit in *Collins*. *Wiley v. Mississippi*, ____ U.S. ____, 107 S.Ct. 304, 93 L.Ed.2d 278 (1986) (dissent from denial of certiorari); *see also Williams v. Ohio*, ____ U.S. ____, 107 S.Ct. 1385, 94 L.Ed.2d 699 (1987) (Brennan, White and Marshall, JJ., dissenting from denial of certiorari); *see also McClellan v. Commonwealth*, 715 S.W.2d 464, 474 (Ky. 1986) (*Collins*' Eighth Amendment analysis cited with approval by Leibson, J., in concurring opinion). The United States Fifth Circuit Court of Appeals has rejected the *Collins* Eighth Amendment analysis in the following cases: *Lowenfield v. Phelps*, 817 F.2d 285 (1987); *Wilson v. Butler*, 813 F.2d 664, 673 (1987); *Evans v. Thigpen*, 809 F.2d 239 (1987); *Welcome v. Blackburn*, 793 F.2d 672, 677 (1986); *Glass v. Blackburn*, 791 F.2d 1165, 1174 (1986) and *Wingo v. Blackburn*, 783 F.2d 1046, 1051 (1986). The North Carolina Supreme Court has rejected the Eighth Circuit's Eighth Amendment analysis in *State v. Quesinberry*, 319 N.C. 228, 237, 354 S.E.2d 446, 452 (1987) and *State v. Williams*, 317 N.C. 474, 483-86, 346 S.E.2d 405, 411-13 (1986); *see also Pickens v. State*, 292 Ark. 362, 372-73, 730 S.W.2d 230, 236-37 (1987) (Hickman, J., concurring).

at 264. According to the Eighth Circuit, such a state of affairs violates the Eighth Amendment because " . . . [a]n aggravating circumstance is an objective criterion that can be used to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the *same* underlying capital crime" (emphasis added). *Id.* at 264. In essence, the Eighth Circuit holds in *Collins* that the pecuniary gain aggravating circumstance must further narrow a subclass of capital murderers, robber-murderers, that had already been winnowed out of the class of all premeditated murderers and all felony murderers by Arkansas' designation of robbery-murder as capital murder. This analysis by the Eighth Circuit of the Eighth Amendment's requirement in capital sentencing is completely wrong. The Eighth Circuit's interpretation of the Eighth Amendment is wrong because it ignores this Court's plurality interpretation of the Eighth Amendment in *Jurek v. Texas*, 428 U.S. 262 (1976) and this Court's affirmation of *Jurek* in *Zant v. Stephens*, 462 U.S. 862 (1983). [5]

In *Jurek* a plurality of this Court approved Texas' capital sentencing procedure. In Texas, aggravating circumstances are embedded into the definition of capital murder. Louisiana's definition of capital murder is the same as Texas' in this respect. In approving Texas' decision to fix aggravating circumstances into its definition of capital murder, the plurality noted:

> While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . .

5
Jurek is not cited in the Eighth Circuit's *Collins* decision.

> So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option—even potentially—for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime. *Id.* at 270-71.

Seven years after *Jurek* was decided, a majority of this Court decided *Zant v. Stephens, supra.* In *Stephens* this Court cited with approval the *Jurek* plurality's approbation of Texas' capital sentencing procedure in reaching one of *Stephens'* holding: the Eighth Amendment does not require a jury to balance aggravating circumstances against mitigating circumstances at the sentencing stage of a capital trial. *Stephens* at 875-76 n.13, 890. After *Stephens*, there is simply no doubt that the Eighth Amendment permits states to genuinely narrow the class of persons eligible for the death penalty by placing aggravating circumstances within the definition of capital murder. Furthermore, there is no doubt that the Eighth Amendment does not require that aggravating circumstances be considered at the penalty stage of a capital case nor that they be explicitly balanced against mitigating circumstances. Pursuant to *Stephens*, Louisiana could, consist with the Eighth Amendment, genuinely narrow the class of murderers eligible for the death penalty by fixing aggravating circumstances into its definition of capital murder and could forego any further narrowing, by the use

of additional aggravating circumstances, of this class of murderers at the sentencing phases of their capital trials. [6]

In summary, the Eighth Amendment requires that the aggravating circumstances in a state's death penalty sentencing procedure genuinely narrow the class of persons eligible for the death penalty only once. Moreover, the Eighth Amendment permits this narrowing to occur at the initial stage of the capital sentencing process when the state defines capital murder or later, at the sentencing stage of the state's capital trials. Given this Court's holding in *Stephens*, Lowenfield's contention that aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty and must, quite apart from this narrowing function, also focus or guide the jury's deliberation during the penalty stage of a capital trial is incorrect. The Eighth Amendment does not require aggravating circumstances to have a "narrowing" function separate from a "guiding" or "focusing" function—the aggravating circumstances' "narrowing" function, of itself, channels the jury's discretion in the sentencing phase of a capital trial. *Stephens, supra* at 876 n. 14. *See also Welcome v. Blackburn*, 793 F.2d 672, 677 (5th Cir. 1986) and *State v. Williams*, 317 N.C. 474, 483-86, 346 S.E.2d 405, 411-13 (1986); *see generally* Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 Duquesne Law Review 317, 360-69 (1984).

6

At page 43 of his brief, Lowenfield cites *Skipper v. South Carolina*, 106 S.Ct. 1669, 1671 (1986); *Estelle v. Smith*, 451 U.S. 454, 472-73 (1981) and *Adams v. Texas*, 448 U.S. 38, 46 (1980) in an effort to persuade this Court that it has cited *Jurek* for the proposition that the Eighth Amendment requires the jury in the sentencing phase of a capital case to focus on aggravating circumstances and to balance them against mitigating circumstances. *Estelle v. Smith* and *Adams* were decided prior to *Zant v. Stephens*. In any event, none of these cases deals with the specific issue presented in the instant case. Moreover, the passages Lowenfield cites are mere dicta insofar as they were mentioned by this Court in resolving the issues posed in these cases.

CONCLUSION

Amicus curiae the State of Arkansas respectfully requests that this Honorable Court affirm the Eighth Amendment analysis set forth by the United States Fifth Circuit of Appeals in the case of *Lowenfield v. Phelps*, 817 F.2d 285 (1987) and that this Honorable Court hold that the Eighth Amendment analysis set forth by the United States Eighth Circuit Court of Appeals in *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, ____ U.S. ____, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985) is incorrect.

Respectfully submitted,

J. STEVEN CLARK
Attorney General of Arkansas

CLINT MILLER
Assistant Attorney General
Heritage West Building
201 East Markham
Little Rock, AR 72201
(501) 371-3657

Attorneys of Record
for AMICUS CURIAE
The State of Arkansas

Supreme Court, U.S.
FILED
OCT 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6867

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

LESLIE LOWENFIELD,
Petitioner,
v.

C. PAUL PHELPS,
Secretary of the Department of Corrections,
State of Louisiana, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

Of Counsel:

MAURICE ROSS
395 South End Avenue
New York, New York 10280
(212) 321-2300

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130
(504) 581-5141

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

GARY S. GUZY
[Counsel of Record]
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 783-1200
Counsel for Petitioner

October 7, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Coercive Procedures, Which Served No Useful Purpose Other Than to Tip the Scales Toward the Death Penalty, Rendered the Sentencing Hearing Unfair and in Violation of the Eighth Amendment and Due Process	1
II. The Louisiana Statutory Scheme, As Applied to Petitioner, Is Unconstitutional for Failing to Enforce the Eighth Amendment Requirement that the Sentencer Find at Least One Meaningful Statutory Aggravating Circumstance as Part of Its Sentencing Consideration	10
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page
Berger v. United States, 62 F.2d 438 (10th Cir. 1932)	3
Booth v. Maryland, 107 S. Ct. 2529 (1987)	6, 9
Brasfield v. United States, 272 U.S. 448 (1926)	*passim*
Caldwell v. Mississippi, 472 U.S. 320 (1985)	8, 12
California v. Brown, 107 S. Ct. 837 (1987)	*passim*
California v. Ramos, 463 U.S. 992 (1983)	13
Clark v. Blackburn, 632 F.2d 531 (5th Cir. 1980)	8
Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985)	11
Cornell v. Iowa, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981)	5
County Court of Ulster County v. Allen, 442 U.S. 140 (1979)	8
Eddings v. Oklahoma, 455 U.S. 104 (1982)	2
Francis v. Franklin, 471 U.S. 307 (1985)	2
Francis v. Henderson, 425 U.S. 536 (1976)	8
Furman v. Georgia, 408 U.S. 238 (1972)	10
Gideon v. Wainwright, 372 U.S. 335 (1963)	6
Godfrey v. Georgia, 446 U.S. 420 (1980)	10, 12
Gregg v. Georgia, 428 U.S. 153 (1976)	10
Henderson v. Kibbe, 431 U.S. 145 (1977)	2
Jenkins v. United States, 380 U.S. 445 (1965)	2
Jones v. Norvell, 472 F.2d 1185 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973)	2, 8
Jurek v. Texas, 428 U.S. 262 (1976)	13
Lowenfield v. Phelps, 495 So. 2d 1245 (1985)	8
Lowenfield v. Phelps, No. 86-5036 (E.D.La., March 31, 1987)	7
People v. Luther, 53 Mich. App. 648, 219 N.W.2d 812 (Mich. Ct. App. 1974), *aff'd*, 394 Mich. 619, 232 N.W.2d 184 (1975)	7
Potter v. United States, 691 F.2d 1275, 1280 (8th Cir. 1982)	3
Reed v. Ross, 468 U.S. 1 (1984)	8
Rose v. State, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983)	4
Rummel v. Estelle, 445 U.S. 263 (1980)	7
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	14

TABLE OF AUTHORITIES—Continued

	Page
Spaziano v. Florida, 468 U.S. 447 (1984)	6
State v. Arvie, 505 So. 2d 44 (La. 1987)	7
State v. Hall, 272 N.W.2d 308 (S.D. 1978)	7
State v. Loyd, 489 So. 2d 898 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987)	11
State v. Mims, 306 Minn. 159, 235 N.W.2d 381 (1975)	7
State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987)	5
State v. Shoemaker, 500 So. 2d 385 (La. 1987)	7
State v. Sonnier, 379 So. 2d 1336 (La. 1979)	7
State v. Thomas, 427 So. 2d 428 (La. 1982)	7
State v. Williams, 480 So. 2d 721 (La. 1985)	12
Thomas v. Blackburn, 623 F.2d 383 (5th Cir. 1980)	8
United States v. Bonam, 772 F.2d 1449 (9th Cir. 1985)	3
United States v. Burke, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983)	3
United States v. Flannery, 451 F.2d 880 (1st Cir. 1971)	3
United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986)	4
United States v. Kahaner, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963)	3, 8
United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)	3
United States v. Rey, 811 F.2d 1453, 1459-60 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987)	3, 4
United States v. Robinson, 560 F.2d 507 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978)	3
United States v. Sae-Chua, 725 F.2d 530 (9th Cir. 1984)	9
United States v. Scott, 547 F.2d 334 (6th Cir. 1977)	3, 9
United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)	4

TABLE OF AUTHORITIES—Continued

	Page
United States v. United States Gypsum Co., 438 U.S. 422 (1978)	*passim*
Wainwright v. Sykes, 433 U.S. 72 (1977)	7
White v. United States, 279 F.2d 740 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960)	8
Zant v. Stephens, 462 U.S. 862 (1983)	10, 11
Statutes	
La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986)	2
La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 1986)	13
Miscellaneous	
Becker, *The Criminal Case: The Allen Charge*, TRIAL, Oct. 1979, at 47	3
Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y.U. L. Rev. 296 (1972) (same)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-6867

LESLIE LOWENFIELD,

Petitioner,

v.

C. PAUL PHELPS,
Secretary of the Department of Corrections,
State of Louisiana, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY BRIEF

ARGUMENT

I. Coercive Procedures, Which Served No Useful Purpose Other Than to Tip the Scales Toward the Death Penalty, Rendered the Sentencing Hearing Unfair and in Violation of the Eighth Amendment and Due Process.

The briefs of respondent and the United States as *amicus* are more noteworthy for their failure to respond to key contentions in petitioner's main brief than for their affirmative arguments.

First, those briefs essentially ignore the special standards applicable to death sentence proceedings and this Court's "extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). Rather, the opposing arguments are framed in light of case law dealing with non-capital guilt proceedings, and what is more, each of the coercive practices challenged here is considered as if it had occurred in isolation rather than, as this Court has required, by assessing the risk of their combined effect in light of "all of the circumstances." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965); *United States* v. *United States Gypsum Co,*, 438 U.S. 422 (1978); *Jones* v. *Norvell*, 472 F.2d 1185 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973) (jury coercion, including *Allen* charge and polling, required reversal of state court conviction on writ of habeas corpus).[1] A significant underlying factor is La. Code Crim. Proc. Ann. art. 905.8 (West 1984 & Supp. 1986). The opposing briefs omit to mention the three state high court decisions discussed in Pet. Br. at 29, overturning death sentences where an *Allen*-type charge was given unnecessarily in the face of similar statutes.

---

[1] Contrary to respondent's view, petitioner is not challenging some isolated element of or omission in a jury instruction, as in *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), and *Francis* v. *Franklin*, 471 U.S. 307 (1985), *cited in* Resp. Br. at 18-21. Rather, as in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), petitioner challenges a conglomeration of circumstances under which the jury's province was unfairly encroached on; as in *Brasfield* v. *United States*, 272 U.S. 448 (1926), petitioner challenges procedures which have a tendency to be coercive and unfair; and petitioner's claim is also grounded in this Court's holdings that a jury's individualized judgment regarding capital punishment cannot be diverted by impermissible extraneous factors. *California* v. *Brown*, 107 S. Ct. 837, 840 (1987).

The *Allen* instruction urging jurors to reach a unanimous verdict, even in its modified form, has been the subject of debate among the courts and commentators as to whether its inherently coercive effect, particularly when given as a "blasting charge" to deadlocked jurors, is counterbalanced by society's interest in avoiding retrials. *See, e.g., United States* v. *Rey*, 811 F.2d 1453, 1459-60 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987) (despite language alterations designed to moderate coerciveness of *Allen* charge, "[p]ractically, the pressure to change position will fall most heavily on the minority"); *accord* Becker, *The Criminal Case: The Allen Charge*, TRIAL, Oct. 1979 at 47, 52 (urging abandonment of all "blasting" charges, including ABA-approved variant of *Allen*); Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 N.Y. U. L. Rev. 296, 316 (1972) (same).[2]

---

[2] Indeed, many of the cases cited by respondent and by the United States acknowledge that to determine whether the potential coerciveness of the *Allen* charge outweighs its usefulness, the charge must be examined in light of all the circumstances. *See, e.g., United States* v. *Bonam*, 772 F.2d 1449, 1451 (9th Cir. 1985). Some of the cited cases found less coercion where, unlike petitioner's case, the court was unaware of the jury's numerical division. *Bonam*, 772 F.2d at 1451; *United States* v. *Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986). Other cited cases require that an element lacking in the *Allen* charge in petitioner's case be included in the charge. *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971) (burden of proof reminder); *Berger* v. *United States*, 62 F.2d 438, 440 (10th Cir. 1932) (burden of proof, reasonable doubt standard); *Potter* v. *United States*, 691 F.2d 1275, 1280 (8th Cir. 1982) (burden of proof, statement that jury may disregard the charge, statement that court is not trying to influence jury). Finally, several of the cited cases acknowledge, as the opposing briefs do not, the significance of the speedy return of a verdict after the *Allen* charge in assessing its coercive effect. *United States* v. *Burke*, 700 F.2d 70, 80 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977); *United States v. Kahaner*, 317 F.2d 459, 484 (2d Cir. 1963), *cert. denied*, 375 U.S. 835 (1963); *United States v. Robinson*, 560 F.2d 507, 517-18 (2d Cir. 1977), *cert. denied*, 435 U.S. 905 (1978);

What the opposing briefs fail to acknowledge, however, is that in the context of this sentencing hearing under the Louisiana Code, none of these "compelling societal interests" is present. *See* U.S. Br. at 11. Respondent argues that "[a]fter seven days of trial and deliberations, a declaration of a mistrial was a decision with major consequences," Resp. Br. at 27, and the United States' brief dwells at length on the costs and injustice of retrials. U.S. Br. at 10-17.[3] Yet here, there was no possibility under the Louisiana Code of another sentencing hearing since a less-than-unanimous jury should have resulted automatically in a life sentence without parole. Accordingly, the *Allen* charge, like the polling conducted by the trial judge, "serv[ed] no useful purpose," *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926), and stands nakedly coercive. See *Rose* v. *State*, 425 So. 2d 521 (Fla. 1982), *cert. denied*, 461 U.S. 909 (1983) ("no reason" to give *Allen* charge in light of similar statute).

Moreover, in light of the Louisiana code provision, the reference in the charge to the jury's duty to attempt to reach a unanimous verdict described as "just" carried the impermissible message that the jury's inability to reach a verdict—which should have resulted automatically in a life sentence without parole—was less than "just." (J.A. 56). In the circumstances, the charge created the risk of influencing the jury by "extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him." *California* v. *Brown*, 107 S. Ct. 837, 840 (1987).

United States v. Gordon, 780 F.2d 1165, 1177 (5th Cir. 1986). *See also United States* v. *United States Gypsum Co.*, 438 U.S. 422, 462 (1978).

[3] There is substantial doubt about this rationale for the *Allen* charge, even where retrial is possible. *See, e.g., United States v. Rey*, 811 F.2d 1453, 1460 (11th Cir. 1987), *cert. denied*, No. 86-2060 (Oct. 5, 1987) (since a hung jury often leads not to retrial but to a plea arrangement or dropping of charges, there is no necessity for judges to use coercive verdict-urging charge); *accord United States* v. *Thomas*, 449 F.2d 1177, 1184 (D.C. Cir. 1971).

The United States' contention that there is no right to a "hung" or "lawless" jury misses the point. U.S. Br. at 14-15. Here there could be no "hung" jury in the sense of requiring a retrial, and petitioner did not seek a hung jury but a sentence preserving his life, as mandated by the State code in the event of a less-than-unanimous jury. *See State* v. *Ramseur*, 106 N.J. 123, 524 A.2d 188, 284-85 (1987). Respondent similarly speaks of the need to have "a reminder" to the jury that the goal of its deliberations was a verdict, Resp. Br. at 32, but that was not the only legitimate goal of the hearing under the Louisiana statute. Moreover, the jurors here had received an *Allen*-type charge at the outset, and then had deliberated for nine hours before announcing their disagreement and "great distress" (J.A. 7, 8, 17), so it cannot be said that they needed a reminder of the need to deliberate rather than "simply taking a vote on the accused's guilt or innocence." U.S. Br. at 13.

Nor do the opposing briefs give sufficient weight to the fact that the "blasting" charge here was delivered after two polls, each of which identified and isolated those jurors who, by opposing further deliberations, favored a conclusion which they knew would result in a life sentence. *See* cases cited in Pet. Br. at 20 (condemning "blasting" charge after polling). While recognizing the case law's emphasis on the need to modify the traditional *Allen* charge to avoid its focus on the minority, the opposing briefs fail to address the fact that when the instruction follows a jury poll, "the impression is inherently conveyed to the jury that the revelation of their division prompted the giving of the subsequent verdict-urging instruction and that it is, therefore, directed toward the minority jurors." *Cornell* v. *Iowa*, 628 F.2d 1044, 1048 n.2 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981).

Contrary to the position taken in the opposing briefs, the two polls here tended be at least as coercive as that

condemned in *Brasfield*, where the inquiry was into the numerical split as to guilt but not which side the minority favored.[4] Here, in light of the jury's awareness that cessation of deliberations meant a life sentence, those jurors who stated that they favored cessation of deliberations were necessarily indicating that they favored the life sentence which would automatically follow from such cessation. The opposing briefs' speculation (Resp. Br. at 36, U.S. Br. at 28-29) that the jurors' death sentence views were not revealed by the polls is contrary to logic and common sense. Moreover, such speculation flies in the face of Justice Stone's perceptive admonition in *Brasfield* that the precise effect of polling often depends on factors which "cannot properly be known to the trial judge or to the appellate court"; yet "its tendency is coercive" and it "can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury. . . ." 272 U.S. at 450. Importantly here, this Court's capital cases mandate procedures which avoid a "risk" of unreliability. *See, e.g., Booth* v. *Maryland*, 107 S.Ct. 2529, 2533 (1987).

Unlike *Brasfield*, where the trial judge merely asked for the numerical division, the coercive tendency here was magnified by the requirement that the jurors

---

[4] In regard to this Court's decision in *Brasfield* v. *United States*, 272 U.S. 448 (1926), which held that the "inquiry itself should be regarded as ground for reversal" because it tends to be "coercive" and to undermine "the fair and impartial conduct of the trial," *id.* at 450, the opposing briefs urge that the holding was not of constitutional dimension. While *Brasfield* involved a federal trial where there was no occasion to reach a constitutional issue, the standard applied is precisely that used by this court to measure due process protection in general as well as the high standard applicable in death sentence procedures. *See, e.g., Gideon* v. *Wainwright*, 372 U.S. 335, 342 (1963) (right to counsel is "fundamental and essential to a fair trial"); *Spaziano* v. *Florida*, 468 U.S. 447, 459 (1984) (Eighth Amendment standards require "measured, consistent application and fairness to the accused").

individually identify themselves and state their positions, on two occasions, in writing, and submit those writings to the trial judge.[5] Plainly, this aspect of the procedure "serv[ed] no useful purpose," *Brasfield* at 450, and increased the pressure on the minority jurors who identified themselves to the judge. Contrary to the argument in the opposing briefs that the judge needed to have such information, Resp. Br. at 27, U.S. Br. at 28, the court could have obtained a sense of whether the jury felt that further deliberations were useful simply by directing the foreman to discuss the matter with the jurors in the privacy of the jury room and generally advise the court without divulging the numerical split or the views of individually-named jurors. *See, e.g., People* v. *Luther*, 53 Mich. App. 648, 219 N.W.2d 812, 814 (Mich. Ct. App. 1974), *aff'd*, 394 Mich. 619, 232 N.W.2d 184 (1975); *State* v. *Mims*, 235 N.W.2d 381, 387 (Minn. 1975); *State* v. *Hall*, 272 N.W.2d 308, 312-13 (S.D. 1978).[6]

---

[5] In this highly publicized case involving the death of a Deputy Sheriff, public pressure on the jurors was running high in any event. *See Lowenfeld* v. *Phelps*, No. 86-5036, slip op. at 14-15 (E.D. La., March 31, 1987) (J.A. 66, 80-81).

[6] Respondent does not, and cannot, contend that petitioner's claim in regard to the circumstances which posed an unconstitutional risk of jury coercion is barred by any alleged failure to object at trial. *See Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Petitioner's claim is properly before this court on multiple grounds, each of which is sufficient to preserve that claim: first, because petitioner repeatedly objected to the denial of his motions for mistrial, to terminate the proceedings and to instruct the jury that there was no obligation under the law that they reach a verdict (J.A. 50-51, 52-53, 54-55); second, because the mistrial motions and objections met Louisiana's flexible and informal contemporaneous-objection rule, *State* v. *Shoemaker*, 500 So. 2d 385, 388-89 (La. 1987); third, because the Louisiana Supreme Court "routinely reviews all errors, even those to which no objection was lodged, in capital cases in which the death penalty has been imposed," *State* v. *Arvie*, 505 So. 2d 44, 47 n.2 (La. 1987); *State* v. *Thomas*, 427 So. 2d 428, 433 (La. 1982); *State* v. *Sonnier*, 379 So. 2d 1336, 1370 (La. 1979), and therefore federal habeas review is not barred, *Rummel* v. *Estelle*, 445 U.S.

The argument that the other jurors were not told of the polls' results misses the point; the jurors already knew each other's views from their discussion in the jury room. Resp. Br. at 35-36. The coercion emanated from the trial judge's questions, which carried a message favoring further deliberations essential to impose the death penalty; and from invading the jury's secrecy by requiring individual jurors to disclose their personal views in writings submitted to the judge. *See Jones* v. *Norvell*, 472 F.2d 1185, 1186 (6th Cir.) (per curiam), *cert. denied*, 411 U.S. 986 (1973) (invasion of jury secrecy held to be coercive factor relevant in reversing a state court criminal conviction on writ of habeas corpus; *citing Parker* v. *Gladden*, 385 U.S. 363 (1966) and *Turner* v. *Louisiana*, 379 U.S. 466 (1965)). Finally, while a jury request would not excuse unfair procedures, (*see* Resp. Br. at 40, U.S. Br. at 20), the fact is that the jurors did not request the polls, the opportunity to identify their positions in writing, or the repetition of the *Allen* charge.[7] The fact that the jurors indicated a "great

---

263, 267 n.7 (1980), *Reed* v. *Ross*, 468 U.S. 1, 7 n.4 (1984); fourth, because the Louisiana Supreme Court decided the claim strictly on the merits, *Lowenfield* v. *Phelps*, 495 So. 2d 1245, 1259-60 (1985), as did the state district court in petitioner's state habeas proceeding. *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 152-54 (1979); *accord Caldwell* v. *Mississippi*, 472 U.S. 320, 327 (1985); *Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). *See also Clark* v. *Blackburn*, 632 F.2d 531, 533 n.1 (5th Cir. 1980); *Thomas* v. *Blackburn*, 623 F.2d 383, 386 & n.1 (5th Cir. 1980) (where state court decides the claim on the merits in state habeas proceeding, claim may be reviewed subsequently on federal habeas).

In view of the above, and considering that petitioner challenges the totality of the circumstances, respondent's statement that petitioner's counsel stipulated to "the method for handling juror questions during deliberations" fails to demonstrate that petitioner waived his jury coercion claim. Resp. Br. at 38.

[7] Thus, this case is unlike the cases cited by the United States at 20, where juries specifically requested that the court repeat the *Allen*-type charge. *United States* v. *Kahaner*, 317 F.2d 459, 484 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963); *White* v. *United States*,

unbalance in the voting" and expressed "great distress" should have signaled to the court that their sensitive state required a cautious response, consonant with the Louisiana code provision regarding the effect of non-unanimity, which would not have pressured the minority or carried any implication that a unanimous decision would be a "just" result. (J.A. 46, 56). The jury's "internal pressures and apparent disagreement," *Gypsum*, 438 U.S. at 460, together with the speedy return of a verdict after the *Allen* charge, give "rise to serious questions," *id.* at 462, about the fairness of the proceedings.

Considering all the circumstances, and in light of the heightened need for reliability in capital sentencing, the conduct challenged here posed a "constitutionally unacceptable risk," *Booth* v. *Maryland*, 107 S.Ct. 2529, 2533 (1987), that the integrity of the jury was compromised. The tendency to coerce and improperly influence the jury was particularly serious since it was engaged in the delicate and unique, individualized task of formulating a "reasoned *moral* response" on the issue of life or death, *California* v. *Brown*, 107 S. Ct. at 841 (O'Connor, J., concurring) (emphasis in original). The combination of events here created a clear risk that the identified minority were pushed into agreement with the majority on the

---

279 F.2d 740, 750 (4th Cir.), *cert. denied*, 364 U.S. 850 (1960). Furthermore, the fact that the jury sought guidance on two occasions, first when it was in "great distress" due to being "unable to reach a decision at this time," (J.A. 17), and the second time when some jurors failed to understand the poll (*id.*), does not mean the jury was asking to be subjected to the barrage of coercive events which ensued. *See United States* v. *Sae-Chua*, 725 F.2d 530, 531 (9th Cir. 1984) (reversing conviction due to an *Allen* charge and polling administered in response to foreman's note asking whether or not deliberations should continue); *United States* v. *Scott*, 547 F.2d 334, 336 (6th Cir. 1977) (reversing conviction where *Allen* charge was given in response to the jury's note requesting "advice" about "some division of thinking among the jury.")

basis of "extraneous emotional factors" generated by the pressure to reach the unanimity required for the death sentence under the Louisiana Code. *Id.* at 840.

II. The Louisiana Statutory Scheme, As Applied to Petitioner, Is Unconstitutional for Failing to Enforce the Eighth Amendment Requirement that the Sentencer Find at Least One Meaningful Statutory Aggravating Circumstance as Part of Its Sentencing Consideration.

Respondent argues that Louisiana's narrow definition of capital murder is sufficient, in and of itself, to provide a sentencing jury with adequate guidance in order to limit its discretion within constitutional bounds. Resp. Br. at 56. This contention ignores two fundamental and well-established requirements of this Court's death penalty doctrine. First, respondent fails to come to grips with the line of precedent—beginning with *Gregg* v. *Georgia*, 428 U.S. 153 (1976), and extending to *Godfrey* v. *Georgia*, 446 U.S. 420 (1980), and then to *Zant* v. *Stephens*, 462 U.S. 862 (1983), as discussed in our main brief on pages 34-35—requiring that the sentencer find at least one meaningful statutory aggravating sentencing factor as the means to limit and guide sentencer discretion in determining who, among those convicted of murder, deserves to die. That petitioner's jury may have considered mitigating circumstances at the sentencing proceeding, Resp. Br. at 54, does not satisfy this fundamental constitutional requirement. Pet. Br. at 37-38.[8]

The second failing of respondent's argument is that—by relying primarily on the narrowness of the Louisiana statutory definition of first degree murder as a means of purportedly satisfying the Eighth Amendment require-

[8] This Court has never held that a sentencer's consideration of mitigating circumstances alone can satisfy the Eighth Amendment's concerns over unguided sentencer discretion expressed in *Furman* v. *Georgia*, 408 U.S. 238 (1972). Indeed, respondent cannot and does not cite to any such case to support its novel proposition.

ments—respondent essentially concedes that petitioner was deprived of the protection afforded him by the Louisiana statute: a separate sentencing proceeding at which the sentencer must consider a broad range of sentencing factors, including the presence or absence of aggravating sentencing circumstances. *Zant* v. *Stephens*, 462 U.S. 862, 876 (1982).[9] Under the sentencing procedures specified in the Louisiana code, petitioner's jury was not informed at the guilt stage of the statutory consequences of its decision and was not then engaged in a "chaneled sentencing proceeding" in which it was distinguishing "a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed." *Zant* v. *Stephens*, 462 U.S. at 883, 886. Nor was the jury at that stage engaged in rendering

---

[9] Respondent argues that "[t]here is no mandate in Louisiana's scheme that the jury must weigh the mitigating against the aggravating circumstances." Resp. Br. at 55. That contention is pertinent only where the issue is—as in *Collins* v. *Lockhart*, 754 F.2d 258 (8th Cir. 1985), but not here—whether invalid aggravating circumstances were weighed even though the jury found at least one valid aggravating circumstance. Here, where the sole valid aggravating circumstance was one which had already been found in the determination of whether petitioner was guilty of first degree murder, the requirement in the Louisiana code to find at least one aggravating circumstance at the sentencing hearing became meaningless and failed to fulfill the function of rationally narrowing the category of persons convicted of murder who are eligible for the death penalty. *Zant v. Stephens*, 462 U.S. 862, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe penalty on the defendant compared to others found guilty of murder."). It should be noted that a recent decision of the Louisiana Supreme Court stated that "a considerable amount of 'weighing' [of aggravating and mitigating factors] must be engaged in by the jury," *State* v. *Loyd*, 489 So. 2d 898, 905 (La. 1986), *cert. denied*, 107 S. Ct. 1984 (1987). Even under this interpretation of Louisiana law, any guidance provided the sentencer by this "weighing" function of the sentencing hearing, as well as by its narrowing function, was rendered meaningless in the absence of a *de novo* finding of at least one aggravating circumstance, as mandated by the Louisiana code.

the "individualized assessment of the appropriateness of the death penalty" essential to capital sentencing under the Eighth Amendment. *California* v. *Brown*, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring). At the sentencing phase, the jury was not required to confront sentencing questions afresh. As permitted under the Louisiana Code, the jury was told by the prosecutor that it need only find the very element it had already found as part of its guilt determination. (J.A. 38).[10] Accordingly, the jury did not engage in the individualized and subjective moral inquiry demanded by the Eighth Amendment. *See, e.g., Caldwell* v. *Mississippi*, 472 U.S. 320, 329-30 (1985).

---

[10] While *amicus* State of Arkansas proffers the additional novel explanation of how the aggravating circumstance may be narrower than the definition of capital murder under which petitioner was convicted, the record does not support such a distinction. The State of Louisiana itself concedes that "Lowenfield's capital conviction was based on a single aggravating circumstance which was found at the definitional stage. Thereafter, he was sentenced to death based on the same sole aggravating circumstance. . . ." (Resp. Br. at 64). Respondent's concession is consistent with the jury's understanding of the identity of the statutory aggravating circumstance and the element of the crime of which it had convicted petitioner; the jury was explicitly told by the prosecutor that, to sentence petitioner to death, it need only find the very element it had just determined to exist as part of the guilty verdict. (J.A. 38). *Cf. California* v. *Brown*, 107 S. Ct. 837, 842 (1987) (O'Connor, J., concurring) (referring to importance of assessing effect of prosecutor's statements on jury's understanding of its responsibilities); *Godfrey* v. *Georgia*, 446 U.S. 420, 432 (1980) (same). Furthermore, Arkansas' argument is rebutted by the Louisiana Supreme Court's opinion in *State* v. *Williams*, 480 So. 2d 721, 726-27 (La. 1985), holding that Louisiana's first degree murder statute and the aggravating circumstance found here should be "construe[d] in a parallel fashion" because they "reflect the same legislative intent . . . " Since the requirements of the two provisions, as interpreted by the Louisiana Supreme Court, are identical, the aggravating circumstance found here could not have served the constitutionally-mandated narrowing function.

Rspondent's claim that the concerns expressed in *Furman* have been met is premised solely on its contentionthat the Louisiana sentencing scheme is identical to the Texas sentencing scheme approved by the Court in *Jurek* v. *Texas*, 428 U.S. 262 (1976).[11] This contention, amply refuted in our main brief at pages 39 through 44, cannot withstand careful scrutiny. *Jurek* neither considered nor contemplated a statute which permits a death sentnce to be imposed without a finding of any aggravating elements beyond those contained in the capital crime itself. The significant additional statutory questions which a Texas jury must confront to sentence a defendant to death provide it with the clear guidance in exercising its sentencing discretion that petitioner's Louisianajury lacked, and offer a basis for distinguishing who deserves to die among those convicted of capital murder. See cases cited in Pet. Br. at 12. *See also California* v. *Ramos*, 463 U.S. 992, 1008 (1983) (referring to one of the special questions under the Texas statute as providing "the aggravating factor . . . in the Texas scheme."). Even were one to accept on its face the *Jurek* plurality's *dict*[12] that the narrow definitions of capital murder

---

[11]Respondent tries to squeeze the procedure applied to petitioner within the dictates of the Eighth Amendment by distorting the Louiana statute. Respondent's claim that "Louisiana's capital sentncing scheme is basically similar to Texas' because the aggravatig circumstances are found at the definitional stage [of the crim]," Resp. Br. at 55-56, is at sharp variance with the Louisiana statte, La. Code Crim. Proc. Ann. art. 905 (West 1984 & Supp. 198), which provides for a bifurcated guilt and penalty determinatn where the aggravating circumstances must be found only at the earing in the sentencing phase.

[12]By relying on arguably favorable *dicta* in an otherwise inapposite case—and by disregarding this Court's subsequent interpretatin of that language as also requiring the finding of at least one meaingful statutory aggravating circumstance as part of the sentncing consideration (*see* cases cited in Pet. Br. at 43)—respondent would have the Court improperly engage in the so-called

may serve much the same purpose as aggravating sentencing circumstances, 428 U.S. at 270, that statement is wholly irrelevant to the situation in Louisiana, where the statute requires that the appropriate sentence be determined in a separate proceeding. Accordingly, there is no basis for concluding that this Court has already reached the question presented in this case, or that Louisiana's purportedly narrow definition of capital murder can or did provide sufficient sentencer guidance to satisfy the Eighth Amendment's rigorous requirements.

CONCLUSION

For the reasons set forth above, petitioner's sentence of death must be vacated and the decision below of the United States Court of Appeals for the Fifth Circuit must be reversed.

Respectfully submitted,

Of Counsel:

MAURICE ROSS
395 South End Avenue
New York, New York 10280
(212) 321-2300

NANCY J. MARSHALL
755 Magazine Street
New Orleans, Louisiana 70130
(504) 581-5141

STEVEN A. HIRSCH
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

DAVID KLINGSBERG
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

GARY S. GUZY
[Counsel of Record]
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 783-1200
Counsel for Petitioner

October 7, 1987

" 'domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation.' " *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 246 (1973).